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Nos. 77-983, 78-119 and 78-139

IN THE

Supreme Court of the United States

October Term, 1978

STATE OF WASHINGTON, *et al.*,
Petitioners,
v.
WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION AND WASHINGTON KELPERS ASSOCIATION,
Respondents.

STATE OF WASHINGTON, *et al.*,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

PUGET SOUND GILLNETTERS ASSOCIATION, *et al.*,
Petitioners,
v.
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

BRIEF OF *AMICUS CURIAE* AMERICAN INSTITUTE OF FISHERY RESEARCH BIOLOGISTS

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SUBJECT INDEX

Page

I. Motion for Leave to File Brief of *Amicus Curiae*.... 1
- A. Statement of the Case 2
- B. Interests Represented 4
- C. Reasons for Granting the Motion 4

II. Biological and Technical Premises..... 5
- A. The Salmon and Steelhead Resources 5
- B. The Fishermen 10

III. Fisheries Management 13
- A. Salmon and Steelhead Fisheries Management.. 13
- B. Existing Management Institutions 17
  - 1. State Agencies 18
  - 2. The Treaty Tribes 20
  - 3. The Federal District Court 26
  - 4. Regional Fishery Management Councils..... 29
  - 5. International Pacific Salmon Fisheries Commission 30
  - 6. Federal Agencies 32
  - 7. Canada 33

IV. Scientific Argument 33
- 1. Data Collection and Analysis..... 34
- 2. Regulation of Fishermen 35
- 3. Mixed Stocks 36
- 4. Enforcement 36

V. Summary of Legal Argument 37
- 1. A Unified Management System Is Necessary In Order to Best Effectuate Treaty Rights of Both Indians and Non-Indians 37
- 2. The Court Should Give Effect to Clearly Stated

Page

Congressional Policy With Regard to Fishery Resources and the Environment 37

3. This Court Has Recognized a Judicial Duty to Conserve Renewable Fishery Resources..... 37

VI. Legal Argument 38

1. A Unified Management System Is Necessary In Order to Best Effectuate Treaty Rights of Both Indians and Non-Indians 38

2. The Court Should Give Effect to Clearly Stated Congressional Policy With Regard to Fishery Resources and the Environment 40

3. This Court Has Recognized a Judicial Duty to Conserve Renewable Fishery Resources..... 42

VII. Conclusion 47

Table of Cases

Antoine v. Washington, 420 U.S. 194 (1975).....23, 25

Corsa v. Tawes, 149 F. Supp. 771 (D. Md. 1957), *affirmed per curiam*, 355 U.S. 37 (1957)..... 18

Geer v. State of Connecticut, 161 U.S. 519 (1896)..... 42

Douglas v. Seacoast Products, Inc., 97 S. Ct. 1740 (1977)..... 42

Helvering v. Sabine Transp. Co., 318 U.S. 306 (1943).. 41

Missouri, K. & T. R. Co. v. Wulf, 226 U.S. 570 (1913).. 41

New York ex rel. Kennedy v. Becker, 241 U.S. 556 (1916).....44, 45

Puget Sound Gillnetters v. Moos, 88 Wn.2d 677, 565 P.2d 1151 (1977)..... 19

Purse Seine v. Moos, 88 Wn.2d 799, 567 P.2d 205 (1977)..... 32

Puyallup Tribe v. Washington Game Dept. (III), 433 U.S. 165 (1977).....21, 45, 46

Page

Puyallup Tribe v. Department of Game (I), 391 U.S. 392 (1968).....23, 45, 46

Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974) 22

Spokane Falls & N. R. Co. v. Ziegler, 167 U.S. 65 (1897)..... 41

State of Maryland, Dept. of N. Res. v. Amerada Hess Corp., 350 F. Supp. 1060 (D. Md. 1972)..... 43

State ex rel. Bacich v. Huse, 187 Wash. 75, 59 P.2d 1101 (1936)..... 42

State ex rel. Campbell v. Case, 182 Wash. 334, 47 P.2d 24 (1935)..... 42

St. Louis, I. M. & S. R. Co. v. Starbird, 243 U.S. 592 (1917)..... 41

Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948)..... 42

Toomer v. Witsell, 334 U.S. 385 (1948).....42, 43

Tulee v. Washington, 315 U.S. 681 (1942).....22, 23, 46

United States v. Darby, 312 U.S. 100 (1941)..... 41

United States v. State of Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *affirmed*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423, U.S. 1086 (1976).....2, 3, 20, 21, 24, 25, 26, *et. seq.*

United States v. Winans, 198 U.S. 371 (1905) 22, 38

Washington Game Dept. v. Puyallup Tribe (II), 414 U.S. 44 (1973).....23, 24, 45, 46

Constitutional Provisions

California State Const. § 20, art. 4..... 20

Statutes

AS 16.05.020(2) 20

California Fish and Game Code § 200..... 20

California Fish and Game Code § 700..... 20

	Page
California Fish and Game Code § 702	20
California Fish and Game Code § 7701	20
ORS 496.080	19
ORS 496.138	19
ORS 506.036(2)	19
RCW 75.08.012	18, 19
RCW 75.08.080	18, 19
RCW 75.20.050 *et seq.*	14
RCW 75.28.500	13
RCW 75.40.060	31, 32
RCW 77.04.020	19
RCW 77.12.010	19
RCW 77.12.040	19
Revised Statutes of Canada Ch. F-14 (1970)	33
50 Stat. 1355 (1937)	30
Treaty of Medicine Creek, 10 Stat. 1132 (1855)	2
Treaty of Point Elliott, 12 Stat. 927 (1859)	2
Treaty of Point No Point, 12 Stat. 933 (1859)	2
Treaty With the Makah, 12 Stat. 939 (1859)	2
Treaty With the Quinaeilt, et al, 12 Stat. 971 (1859)	2
Treaty With the Yakimas, 12 Stat. 951 (1859)	2
16 U.S.C. §§ 776-776f	30
16 U.S.C. § 776a	30
16 U.S.C. § 1531, *et seq.*	41
16 U.S.C. § 1801, *et seq.*	29, 40
16 U.S.C. § 1812	29, 33
16 U.S.C. § 1851	41
16 U.S.C. § 1852	29
16 U.S.C. § 1855	29

	Page
16 U.S.C. § 1856	29
16 U.S.C. § 1856(b)(A)	29
16 U.S.C. § 1856(b)(B)	29, 30
16 U.S.C. § 1861	29
25 U.S.C. § 2	32
25 U.S.C. § 9	32
25 U.S.C. §§ 1301-1341	26
42 U.S.C. § 4321, *et seq*	40
43 U.S.C. §§ 1301-1315	18
43 U.S.C. § 1301(b)	18
43 U.S.C. § 1311(a)(2)	18

Other Authority

Almanac of Bristol Bay Sockeye Salmon, Fisheries Research Institute, College of Fisheries, University of Washington, Circular No. 235 (1965)	7
Commercial and Recreational Salmon Fisheries off the Coasts of Washington, Oregon, and California Commencing in 1978, March 1978	32
Catch, Licensing, Gear Reduction, and Allowable Fishing Time History for Washington Salmon Fisheries 1965-1977, Report to the Regional Task Force of the Presidential Task Force on Northwest Fisheries Problems (1977)	13
Effect of the Obstruction at Hell's Gate on the Sockeye Salmon of the Fraser River, International Pacific Salmon Fisheries Commission, Bulletin 1 (1945)	8
41 Fed. Reg. 108	31
42 Fed. Reg. 117	32
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43 Fed. Reg. 122	32

Page

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BRIEF OF *AMICUS CURIAE* AMERICAN INSTITUTE OF FISHERY RESEARCH BIOLOGISTS

I. Motion for Leave to File Brief of *Amicus Curiae*

The *amicus curiae* is the American Institute of Fishery Research Biologists. The Institute is an international association of professional fisheries scientists and managers founded in 1956. Many of the Institute's 1,100 members have been or are involved in managing and investigating salmon and steelhead resources. The Institute moves the

Court for an order giving the Institute leave to file this brief. The Institute has received the written permission of the United States, the Puget Sound Gillnetters Association, and the Purse Seine Vessel Owners Association. The Institute has not received the permission of the Indian tribes, the State of Washington, the Washington State Commercial Passenger Fishing Vessel Association, or the Washington Kelpers Association.

A. *Statement of the Case*

The cases under review in this proceeding comprise the most recent chapter in a dispute which has festered in the Pacific Northwest since before the beginning of the 20th century. The controversy stems from six treaties signed in the 1850's by Isaac Stevens acting for the federal government and by tribal representatives acting for a number of western Washington Indian tribes.[1] Since that time, repeated litigation has required the attention of the state and federal courts of the region. The Supreme Court has regularly been called upon to settle the issues arising from the often hostile encounters between the litigants. The subject matter of the dispute is fish, namely, the salmon and steelhead resources of western Washington.

This latest series of cases, now before this Court, started with the decision of the United States District Court for the Western District of Washington in *United States v. State of Washington,* 384 F. Supp. 312 (W.D. Wash. 1974), cited hereinafter as "*U.S. v. Washington*". The trial judge made two broad rulings. The court ruled first, that the

1. The six treaties are those of Medicine Creek, 10 Stat. 1132 (1855), Point Elliott, 12 Stat. 927 (1859), Point No Point, 12 Stat. 933 (1859), and those with the Makah, 12 Stat. 939 (1859), the Quinaeilt, *et al.*, 12 Stat. 971 (1859), and the Yakimas, 12 Stat. 951 (1859).

treaty tribes and Washington state agencies had defined roles to play in managing the salmon and steelhead fisheries of western Washington, 384 F. Supp. at pp. 339-341, and second, that the members of modern Indian tribes who had descended from the original signatories had the right to an opportunity to harvest a specified share of the salmon and steelhead resources within the tribes' usual and accustomed fishing grounds in a "case area" in western Washington, 384 F. Supp. at p. 343.

The court defined as the case area that portion of the state of Washington west of the Cascade Mountains and north of the Columbia River drainage area, including the American portion of the Puget Sound watershed, the watersheds of the Olympic Peninsula north of the Grays Harbor watershed, and the offshore waters adjacent to those areas, 384 F. Supp. at p. 328. A subsequent order of the court extended the case area to include the Grays Harbor watershed, (R. ....). Within the case area the court described usual and accustomed grounds as the freshwater systems and marine areas within which the treaty Indians fished at varying times, places and seasons, on different runs, 384 F. Supp. at p. 402.

The judgment of the trial court was affirmed by the Ninth Circuit Court of Appeals in *United States v. State of Washington,* 520 F.2d 676 (9th Cir. 1975). The Supreme Court denied *certiorari,* 423 U.S. 1086 (1976). The trial judge retained continuing jurisdiction over the case for implementation purposes, 384 F. Supp. at p. 408, and issued a number of subsequent rulings which, together with the original decision, led to the cases now before this Court.

B. *Interests Represented*

The Institute submits an *amicus* brief in this proceeding because two critical interests are before the Court without representation. The interests are first, that of the continued productivity of the resource itself and second, that of the science of fishery management. The Institute claims to speak on behalf of both interests. The Institute has no direct economic, recreational, or institutional involvement in the controversy and has never litigated treaty fishing questions in the past.

C. *Reasons for Granting the Motion*

The argument of the *amicus* is fundamentally different from that of all parties before the Court. The Institute presents no argument relating to the right to catch fish which may be enjoyed by any party or by any fisherman. *In fact, the Institute specifically disclaims any purpose to affect the rules which this Court may develop or confirm for sharing the resource.* The Institute's argument is directed solely at the portion of the overall controversy which relates to the fisheries management jurisdiction of the institutions—state, federal, tribal, and international—which are involved in managing fisheries for case area salmon and steelhead stocks.

The Institute believes that no party before the Court will adequately analyze and give appropriate emphasis to the interrelationship among the institutions which currently attempt to manage the case area's salmon and steelhead fisheries. These institutions have had, and will continue to have, a profound impact on the resources.

The *amicus* does not argue in favor of or against the jurisdiction of any existing institution. Rather, the *amicus*

argues that diffuse authority, proliferated among tribes, tribunals, states, federal government, regional fishery councils, and international commissions, has so complicated the conservation of the resources as to threaten their very existence. The relief which the *amicus* suggests is also different from that sought by the parties. The Institute does not seek to "win" or "lose" before the Court on the issue of who should manage the fisheries, but rather asks the Court to make a contribution toward the establishment of a unified fisheries management system capable of preserving the resource and attaining other management objectives as may be required by law.

II. Biological and Technical Premises

The Institute's argument depends on an understanding first, of the biological characteristics of salmon and steelhead resources and second, of the technical characteristics of the fisheries operating on those resources. This section discusses each of the two characteristics. The Institute has relied on the joint biological statement of the parties in *U.S. v. Washington*, hereinafter cited as "JX-2", and on well-recognized scientific materials which are cited as appropriate.

A. *The Salmon and Steelhead Resources*

Five species of Pacific salmon and one of steelhead trout are indigenous to the waters of the case area. The five species of salmon are *Oncorhynchus tshawytscha* (chinook), *Oncorhynchus kisutch* (coho), *Oncorhynchus gorbuscha* (pink), *Oncorhynchus keta* (chum), and *Oncorhynchus nerka* (sockeye). The one species of steelhead trout is *Salmo gairdnerii*, JX-2, p. 1.

Salmon and steelhead trout are anadromous fish, that is, they spend most of their lives in salt water but return to freshwater rivers and streams and to some lakes to spawn. When ready to spawn, the female excavates a nest or "redd" in appropriate graveled areas and lays her eggs which are then fertilized by an accompanying male. All Pacific salmon die after spawning, but steelhead trout may spawn several times, JX-2, pp. 1-8.

The eggs incubate in the gravel over the winter and hatch in late winter or spring, depending upon water temperature and other environmental factors. After hatching, the young fry commence a feeding and migration period that varies according to species. Chum and pink salmon fry descend directly to saltwater and commence their marine phase. Sockeye salmon, which are nearly always associated with lake systems, remain in fresh water for one or two years before migrating to sea. The young of coho and chinook salmon usually spend one year in freshwater streams, but certain forms of chinook salmon may go to sea earlier. Steelhead spend one or two years in fresh water before migrating to sea, JX-2, pp. 1-8, Tables 1-17.

Once at sea, case area salmon and steelhead distribute themselves widely, Appendix I, pp. A1-A6, *infra*.[2] The duration of the marine interval varies by species, ranging from two summers and one winter for pink salmon to as

2. Appendix I is based on French, Robert R., Bakkala, Richard G., and Sutherland, Doyle F., 1975. *Ocean Distribution of Stocks of Pacific Salmon, Oncorhynchus spp., and Steelhead Trout, Salmo gairdnerii, as shown by Tagging Experiments*, National Marine Fisheries Service Technical Report, SSRF-689. See also Fredin, Reynold A., Major, Richard L., Bakkala, Richard G., and Tanonaka, George K., 1977. *Pacific Salmon and the High Seas Salmon Fisheries of Japan*, National Marine Fisheries Service Processed Report, pp. 4-19.

much as five years for some stocks of chinook salmon, JX-2, pp. 1-8. At the end of the marine phase, salmon and steelhead begin a unique activity—their return to place of origin to spawn.

Salmon and steelhead trout bound for western Washington waters spawn in a great number of streams and lakes. The salmon spawning areas are shown in Appendix II, pp. A7-A11, *infra*.[3] Each species in each stream system comprises a spawning unit, and the fish born in that stream and returning to it are genetically distinct from all other fish, including those of the same species bound for other streams. Biologists describe each spawning unit as a stock. Each stock among each of the species has its own particular schedule of migration, passing from ocean to stream on a rigid schedule which varies but little over the years.[4] Once destroyed, any given stock is as extinct and irreplaceable as the passenger pigeon.

In addition to being characterized by genetically unique stocks, salmon and steelhead are also marked by the phenomenon of the cycle. The fish in any particular run are with minor exceptions of the same age. Younger fish of the same species scheduled to return to the same spawning area in a later year generally will not be mixed with older fish, but will remain in the ocean until they are ready to commence their spawning migration. Thus, the spawning fish of any year are, for the most part, distinct from the

3. Atkinson, C.E., Rose, J.H., and Duncan, T.O., 1967. *Salmon of the North Pacific Ocean—Part IV. Spawning Populations of North Pacific Salmon. Pacific Salmon in the United States.* International North Pacific Fisheries Commission Bulletin No. 23, Figures 10-14, pp. 85-89.

4. Royce, William F., 1965. *Almanac of Bristol Bay Sockeye Salmon.* Fisheries Research Institute, College of Fisheries, University of Washington. Circular No. 235, p. 1, Figures 1-5, pp. 41-45.

spawning fish of the next year. Each year's spawners begin a cycle which is repeated periodically. The length of the period is equal to the length of the history, *i.e.*, from two to five years depending on species.

The management implication of the cycle is that the abundance of fish returning during peak years does not help to increase the runs in scarce years. Unlike many fisheries, overharvesting in one year cannot be remedied by protective measures in the next. When a cycle is reduced in size to non-productive levels, it may take many years for the stocks to recover to productive levels.[5]

One dramatic example of this phenomenon is the cycle of sockeye salmon runs on the Fraser River in Canada. Every fourth year the size of the run is large, sometimes exceeding the combined runs of the three previous years. The three low years cannot be improved by restrictions in the higher fourth year. A second example of the cycle is that Puget Sound pink salmon return in quantity only during odd numbered years; no viable runs occur in the even numbered years.

The migratory paths of salmon and steelhead follow similar routes year after year, and the fish know no national, state, or local boundaries. Thus, the great Fraser River runs of British Columbia pass through Canadian waters, thence to U.S. waters, and finally back to Canadian waters as they head for the mouth of the Fraser River, pressed forward by the spawning urge. Similarly, salmon destined for spawning grounds in Washington may pass from the open ocean through Alaskan, Californian, Oregonian, and

5. Thompson, William F., 1945. *Effect of the Obstruction at Hell's Gate on the Sockeye Salmon of the Fraser River.* International Pacific Salmon Fisheries Commission, Bulletin 1, pp. 11-12.

then Canadian waters before entering Washington streams, JX-2, pp. 28-37, Figures 13-17.

Each year's spawning migrations are marked by intermixing of stocks. Stocks migrate to shore from widely divergent areas of the Pacific Ocean. Within the near-shore and inshore marine areas, stocks bound for different spawning grounds congregate and intermingle before finally separating and migrating to their respective destinations. As a particular stock progresses through inshore waters toward its river of origin, it becomes identifiable only after separation from other groups of fish.

A run of fish moves through any particular geographical location rapidly, and the bulk of the run may pass along a portion of its route in a matter of a few days, JX-2, pp. 37-39, Figures 20-24.

A final, critical characteristic of the salmon and steelhead resources is that reproductive success depends on the number of adults which reach the spawning grounds, JX-2, pp. 72-73. There is a great deal of evidence indicating a more direct relationship between the numbers of spawners and the resultant progeny in salmon and steelhead than in almost any other species of fish. For each stream there is an optimum number of spawning adults. If more or less than the optimum number spawn, the number of resultant progeny will decline.[6] The fisheries manager seeks to ensure that the optimum number of each stock of fish escape capture by fishermen and are able to spawn each and every year. There is little margin for error.

6. Ricker, W.E., 1954. "Stock and Recruitment" in *Journal Fisheries Research Board of Canada*, Volume II, No. 5, pp. 559-621.

B. *The Fishermen*

There are seven types of fishermen operating on the salmon and steelhead stocks passing through the waters of the case area using seven distinct types of fishing techniques and gear. These are: 1. ocean trollers, 2. gillnetters, 3. purse seiners, 4. reef netters, 5. set netters, 6. dip net and gaff fishermen, and 7. recreational fishermen. The seven fisheries are geographically dispersed. They operate at various times, sometimes simultaneously, sometimes in sequence.[7]

The ocean trolling fleet is highly mobile, extending from mid-California to the Gulf of Alaska, quickly moving to areas where the fishing is best. Trolling involves dragging a number of baits or lures at selected depths behind a moving boat usually manned by one or two persons. Chinook, coho, and lesser numbers of the other species of salmon are susceptible to capture by troll gear. Thirty-three hundred vessels are licensed for trolling in Washington waters. This figure includes approximately 50 tribal fishermen.[8]

Gillnet, purse seine, and reef net fisheries operate in inside waters in the case area, in the Strait of Juan de Fuca, Puget Sound, and Grays Harbor. Gillnets are made of nylon mesh, varying from 4 to 9 inches stretched measure, and are suspended from floats at the surface. Each net forms a vertical wall of netting. The size of the gillnet mesh determines the size range and species of salmon that will be caught. The migrating fish collide with the net

7. *The Pacific Salmon, a Unique Problem in Resource Management,* 1974. Northwest Fisheries Center, National Marine Fisheries Service, pp. 15-19.

8. Merkel, John C., Alverson, Dayton L., Hough, John D., 1978. *Settlement Plan for Washington State Salmon and Steelhead Fisheries,* pp. 274 and 284.

and are tangled in the fine meshes. All five species of salmon are taken by gillnet gear. Approximately two thousand gillnetters are licensed to operate in U.S. waters in Puget Sound and in the Strait of Juan de Fuca, including approximately 500 tribal fishermen. Approximately 300 gillnetters are licensed to fish in Grays Harbor.[9]

Purse seiners set their nets in a circle and "purse" by closing the bottom of the net and bringing it close to the side of the boat. The enclosure is reduced until the fish can be dipped out. All five species of salmon are taken. Approximately 400 purse seine vessels are licensed to fish in Puget Sound. This figure includes approximately 10 tribal vessels. No purse seining occurs in Grays Harbor. Purse seine vessels have a crew of four or five persons.[10]

Reef net fishermen operate in specific locations in northern Puget Sound. An artificial ramp or "reef" is created which leads a school of salmon into the surface layers of the water above a net which is stretched horizontally between two floats. When salmon, particularly sockeye and pink, are observed from a floating tower, the net is raised trapping the fish from below. Approximately 80 fishermen are licensed to operate reef net gear in Puget Sound. Reef netting requires one to four persons.[11]

Gillnets can be anchored or attached at one end to shore, and are then called "set nets." Set nets are operated primarily in fresh water locations in rivers and estuaries. There are approximately 550 treaty fishermen in the case area employing set nets. All five species of salmon as well as steel-

9. *Id.*, pp. 275-276, and 284.
10. *Id.*, pp. 277 and 284.
11. *Id.*, p. 278.

head are taken by set nets. Non-Indians do not operate set gillnets.[12]

Dip net and gaff fishing occurs exclusively in the rivers, usually upstream of all commercial and recreational fishing activities. Non-Indians do not use dip net and gaff gear. The numbers are not known to the Institute with specificity, but a majority of dip netters and gaff fishermen are fishing for salmon and steelhead for personal consumption or ceremonial use only, JX-2, pp. 112-114.

Angling for coho and chinook salmon and for steelhead is the seventh fishery and is one of the major recreational attractions in the western portion of Washington for a large number of the residents and also for thousands of tourists visiting the state during the summer. Angling for salmon in the ocean is conducted from a fleet of over 400 charter boats on which each angler buys a ticket and from thousands of small, privately-owned boats, usually trailered to the launching site and powered by outboard motor. The recreational fishery has increased significantly in participation (angler-days) and value since the 1950's, especially the recreational salmon fishery on the coast and in the Strait of Juan de Fuca. In 1976, there were over 625,000 resident and non-resident anglers who spent 2 million angler-days fishing for salmon in Washington waters. Sixty percent of the total recreational salmon catches in Washington were made in the coastal fishery, while the remaining 40% were caught in the Puget Sound area.

Steelhead add another dimension to the recreational fishery. The number of recreational fishing days by sportsmen angling for steelhead in the streams and rivers of the state

12. *Id.*, p. 284.

has averaged between 100,000 and 150,000 for the past 10 years. During the 1977-78 season this rose to 310,000. The steelhead recreational fishery is not as large, in terms of numbers of anglers, angler-days, or size of the catches, as the salmon recreational fishery, but the esteem in which it is held by steelhead anglers makes this sport fishery important beyond its numbers.

The total fishing capability of all the fishermen in the case area is sufficient, absent regulation, to decimate the resource, RCW 75.28.500. The stocks have survived to the extent they have due to the management activities of the various governing bodies which are discussed in the next section.[13]

III. Fisheries Management

The Institute has set forth the most important characteristics of the resource and the fishermen who harvest it. In this section the Institute provides the Court first, with a definition and a description of salmon and steelhead fisheries management and second, with a picture of the manner in which jurisdiction to manage the case area's salmon and steelhead fisheries is presently divided among the managing institutions.

A. *Salmon and Steelhead Fisheries Management*

The activity of managing salmon and steelhead fisheries is the sum of the regulatory measures taken by management agencies to achieve the goals which the fisheries man-

13. Although case area fish are taken throughout their migratory range, the majority of the fish are taken after they have returned to the case area. See Mundt, J. Carl, 1977. *Catch, Licensing, Gear Reduction, and Allowable Fishing Time History for Washington Salmon Fisheries 1965-1977*, Report to the Regional Task Force of the Presidential Task Force on Northwest Fisheries Problems, pp. 1-5, Exhibits 1-12.

agers are directed to fulfill. These goals are as follows: first and foremost, the conservation of the stocks; second, maximization of the yield from the resource consistent with conservation taking into account economic, social, and ecological objectives; and third, allocation of the yield among competing fisheries.[14]

These goals are achieved, in general, by regulation and control of the fishermen rather than the fish. The regulatory measures employed are restrictions on the size of fish taken, when and where fishing may occur, for how long, and with what number and types of fishing gear. These measures have an indirect effect on the fish themselves by decreasing the possible catch.[15]

The Institute believes that it is essential to understand the mechanics by which the fisheries managers seek to accomplish the goals of conservation, maximization of yield, and allocation. For salmon and steelhead fisheries, those mechanics begin with the collection of biological and statistical information. By obtaining and analyzing historical information on the past performances of the various runs,

14. Gulland, John A., 1977. *Goals and Objectives of Fishery Management*. Food and Agriculture Organization of the United Nations Fisheries Technical Paper No. 166, pp. 6-7. See also Alverson, Dayton L. and Paulik, G.J., 1973. "Objectives and Problems of Managing Aquatic Living Resources." *Journal Fisheries Research Board of Canada*, Vol. 30, No. 12, p. 1937 and McKernan, Donald L., 1972. "World Fisheries–World Concern" in *World Fisheries Policy–Multidisciplinary Views*. Brian J. Rothschild, editor. University of Washington Press, p. 49.

15. To some extent fisheries management agencies manage fish directly through hatchery programs designed to enhance the resource. In addition, fisheries managers with authority beyond regulation of fishermen may have some impact on the use of fresh and estuarine water resources which are the medium in which the fish play out a critical part of their life cycles, see e.g., RCW 75.20.050 *et seq*. The Institute has not discussed these broader forms of authority because its point is adequately made by reference to the more traditional view of fisheries management authority.

the managers can estimate the correlation between the numbers of any given stock permitted to pass through the various commercial and recreational fisheries to spawn on the one hand and the numbers of their progeny which will return at the end of the cycle on the other. As already stated, this relationship between spawners of one generation and adults of the next is more direct for salmon and steelhead than for most other fishes. Managers can then estimate the current escapement necessary to maximize the stock in the future. They can also estimate the minimum escapement necessary to ensure perpetuation of the stock.[16]

With information concerning escapement requirements in hand, the managers typically next turn their attention to making estimates of the size of the incoming adult runs. These estimates too are based on the history of the cycles involved; the escapement of adults during the preceding cycle; the environmental conditions in fresh and salt water during the past cycle; and other data bearing upon the survival of the salmon and steelhead during their life histories. Using these estimates, regulations for the fisheries during the upcoming season are developed and promulgated after public hearings. These regulations become the basis for management of the fishery. The regulations are, however, subject to substantial revision as the runs progress. The revisions are necessary as additional information becomes available during the course of the season concerning run size and changes in numbers of

16. Alverson, Dayton L., 1975. "Management of the Ocean's Living Resources: An Essay Review", in *Ocean Development and International Law Journal*, Vol. 3, No. 2, pp. 105-106.

fishermen and fishing success in order to adjust fishing activity and ensure adequate escapement.[17]

As this biological and statistical information flows in, the fisheries managers use the information to amend their regulations in order to better attain management goals. Because of the migratory habits of the fish, the characteristics of the fishery, and the increasing accuracy of statistical information as any given run progresses, time is critical. *The degree of success achieved by the managers in reaching escapement and other goals is very often a function of obtaining the very latest information, analyzing it, making decisions on regulations, and communicating the contents of these regulations to the fishermen, all in the shortest possible time period during the fishing season.* The sequence of these events sometimes must be accomplished in 12-24 hours.[18]

A factor that complicates this entire process is the intermixing of stocks. A given level of fishing effort may result in an appropriate harvest of one stock but cause over- or under-fishing for a second stock mixed with the first. Difficult management decisions are required in these circumstances.

Finally, the fisheries management agency must enforce its regulations. While this is an important task in the management of any fishery, it is particularly critical in a fishery

17. Existing methods for directly measuring the abundance of a group of fish are prohibitively expensive. Instead, as the runs progress, estimates are made based on the number of fish caught per unit of fishing effort per time interval. The statistical validity of this information improves dramatically as the stocks approach the mouth of their natal rivers and become more concentrated.

18. Carlton, Frank E., 1975. *Optimum Sustained Yield as a Management Concept in Recreational Fisheries.* Special Publication No. 9, American Fisheries Society.

for anadromous species such as steelhead and salmon because illegal fishing can quickly upset the delicate balance between catch levels and escapement goals. The absence of an effective enforcement system renders any salmon and steelhead management plan unworkable. Surveillance, monitoring, and appropriate sanctions are essential ingredients of an effective enforcement system.[19]

The management of salmon and steelhead resources is a complex task. The short-term economic interest of the fishermen lies in maximizing their catch. The managers must be concerned with a large number of unique stocks. Information about the size of each of these stocks is always imperfect, but increasingly accurate as the migrating fish congregate and move closer to their spawning grounds. Simultaneously, the fishermen are massing to concentrate on capturing the incoming fish. Based on the best information available, the managers must decide when, where, and how to allow the various fisheries to operate in order to obtain an optimum escapement, provide a target yield to the fisheries, and properly allocate the catch. These decisions must be rapidly and clearly communicated to the fishermen and there must be adequate enforcement. It is not a simple task.

B. *Existing Management Institutions*

This section sets out the authority of the institutions which presently exercise fisheries management power in the Pacific Northwest. Every entity which exercises control over salmon and steelhead fishermen fishing for stocks of salmon and steelhead which may be found at any stage of their life history within the case area is discussed.

19. Alverson and Paulik, *supra* note 14, at 1944.

1. State Agencies

The federal government through the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1315, has confirmed in the states of the United States power to manage and administer the natural resources, including fisheries resources, which are found within the boundaries of the respective states, 43 U.S.C. § 1311(a)(2). The boundaries of the Pacific coast states through which case area salmon and steelhead migrate—California, Oregon, Washington, and Alaska—extend from the coastline seaward for a distance of three geographical miles, 43 U.S.C. § 1301(b).

The courts have recognized that in the absence of conflicting Congressional legislation under the commerce clause of the U.S. Constitution, the police power of the states extends to the regulation of fisheries within the geographical area covered by the Submerged Lands Act, *Corsa v. Tawes*, 149 F. Supp. 771 (D. Maryland 1957), affirmed *per curiam*, 355 U.S. 37 (1957).

a. *Washington*

(i) Washington Department of Fisheries

The Washington Department of Fisheries, hereinafter referred to as "WDF", has traditionally exercised Washington's police power to manage salmon fisheries. Washington's salmon management authority in the waters of the state is found in RCW 75.08.012, which reads in part:

> "It shall be the duty and purpose of the department of fisheries to preserve, protect, perpetuate and manage the food fish and shellfish in the waters of the state . . . to the end that such food fish and shellfish shall not be taken, possessed, sold or disposed of at such times and in such manner as will impair the supply thereof."

State law also provides for a Director of WDF who is authorized and instructed in RCW 75.08.080 to exercise the state's police power to regulate salmon fisheries.

The Washington Supreme Court recently construed RCW 75.08.012 and .080, holding that the salmon fisheries management authority of WDF and its Director does not include the ability to regulate salmon fisheries for the purpose of allocating the catch among fishermen. In the case *Puget Sound Gillnetters v. Moos*, 88 Wn. 2d 677, 565 P. 2d 1151 (1977), the court decided at p. 682 that WDF and its Director have the authority to regulate the harvest of salmon for the purpose of conserving the resource but not for the purpose of allocating a share of the catch between competing claimants for those fish.

(ii) Washington Department of Game

The Washington Department of Game, hereinafter referred to as "WDG", is the state agency that exercises the state's police power to regulate steelhead fisheries. WDG is composed of a six-member Game Commission and a Director, RCW 77.-04.020. State policy is to preserve, protect, and perpetuate steelhead so that public recreational opportunities will be maximized but the supply will not be impaired, RCW 77.12.010. RCW 77.12.040 instructs the Game Commission to promulgate rules relating to the taking of steelhead.

b. *Oregon*

The Oregon state Fish and Wildlife Commission exercises Oregon's police power with respect to fisheries in Oregon state waters. The Commission, which is part of the state Department of Fish and Wildlife, ORS 496.080, has the authority to "formulate and implement the policies and programs [of Oregon] for the management of wildlife", ORS 496.138. In addition, the Commission has been delegated the following specific authority in ORS 506.036(2):

> "The duty of protection, preservation, propagation, cultivation, development and promotion of all fishes under its jurisdiction within the waters of [Oregon] is delegated to and imposed upon the [C]ommission."

c. *California*

In California a Fish and Game Commission is created by Section 20 of Article 4 of the state Constitution. The Commission's power to regulate the taking of fish is found in California Fish and Game Code sections 200 and 7701. In addition, California Fish and Game Code section 700 provides for a Department of Fish and Game administered through a Director. Under California Fish and Game Code section 702 the Department administers and enforces the provisions of the Fish and Game Code.

d. *Alaska*

The Department of Fish and Game exercises Alaska's police power through a Commissioner, its principal executive officer. The relevant functions of the Commissioner are found in AS 16.05.020(2), which reads in part:

"The commissioner shall . . . manage, protect, maintain, improve, and extend the fish, game and aquatic plant resources of the state in the interest of the economy and general well-being of the state."

2. The Treaty Tribes

The fisheries management authority of the Indian tribes located in the case area can be analyzed in two respects: on-reservation authority and off-reservation authority.

a. *On-reservation*

Surprisingly little has been decided by the courts with regard to tribal on-reservation fisheries management authority. It is apparently settled that the tribes have on-reservation authority over tribal fishing, see *Indian Hunting and Fishing Rights II*, Charles A. Hobbs, 37 George Washington Law Review 1251 (1969) at p. 1264. A second question is whether the tribal authority is exclusive or is to some extent concurrent.

The parties in *U.S. v. Washington* felt that tribal on-reservation management authority was exclusive

and that on-reservation tribal fishing was not subject to the state's normal police power, 384 F. Supp. at p. 341. However, Mr. Justice Brennan dissenting in *Puyallup Tribe v. Washington Game Dept.*, 433 U.S. 165 (1977), hereinafter cited as *"Puyallup III"*, felt that the relationship between state and tribe was not as clear as it had seemed to the parties in *U.S. v. Washington*. He said at p. 182:

"Nor has this Court ever decided whether a State has the power to regulate on-reservation fishing in the interest of conservation."

In contrast, Mr. Justice Stevens, writing for the majority in *Puyallup III* felt that tribal on-reservation authority was not exclusive. He said at pp. 176-177:

"[I]f Puyallup treaty fishermen were allowed untrammeled on-reservation fishing rights, they could interdict completely the migrating fish run and 'pursue the last living [Puyallup River] steelhead until it enters their nets.' . . . In this manner the treaty fishermen could totally frustrate both the jurisdiction of the Washington courts and the rights of the non-Indian citizens of Washington recognized in the treaty of Medicine Creek. In practical effect, therefore, the [Puyallup tribe] is reasserting the right to exclusive control of the steelhead run that was unequivocally rejected in both *Puyallup I* and *Puyallup II*."

Based on the majority opinion in *Puyallup III*, the Institute's analysis is that tribal on-reservation management power is not exclusive. The state also has power, albeit unexercised, to manage on-reservation fisheries, at least for the conservation purpose referred to by Justice Stevens. To that extent, jurisdiction is concurrent.

b. *Off-reservation*

Tribal jurisdiction over off-reservation fishing has been a frequent topic of judicial consideration. The tribes have authority over their own members exercising treaty fishing rights at usual and accustomed off-reservation grounds, 520 F.2d at p. 686. See

also *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974). The remaining question revolves about state jurisdiction over tribal fishermen fishing off-reservation. The precise question is the overlap between state and tribal authority over those fishermen.

The first case in which the Supreme Court considered the question with regard to one of the six treaties which are now before the Court was *United States v. Winans*, 198 U.S. 371 (1905). That case involved the Indians' right to fish at off-reservation grounds rather than the tribes' or the state's power to manage those off-reservation fisheries. The Court did intimate, however, that the treaty right to fish off-reservation was subject to state regulation when it said at p. 384:

> "Nor does it [the right to fish at off-reservation locations] restrain the state unreasonably, if at all, in the regulation of the right."

The first case in which the Supreme Court dealt specifically with the off-reservation jurisdictional relationship between state and tribes was *Tulee v. Washington*, 315 U.S. 681 (1942). In that case a tribal fisherman argued that his treaty right to fish in off-reservation areas was free from state regulation of any kind. The state relied on its broad powers to conserve fish within its borders and asserted the authority to regulate off-reservation treaty fishing in the same fashion as it could regulate any other type of fishing at the off-reservation locations. Mr. Justice Black, speaking for the Court, said at p. 684:

> "We think the state's construction of the treaty is too narrow and the appellant's too broad; that while the treaty leaves the state with power to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here."

The Court went on to indicate at p. 685 that:

> "[I]t is clear that [the state's] regulatory purpose could be accomplished otherwise, that the imposition of license fees is not indispensable to the effectiveness of a state conservation program."

The suggestion was that treaty fishermen fishing off-reservation are simultaneously subject to two management authorities, that of their tribe for all purposes and that of the state for indispensable conservation measures.

The next case in which the Supreme Court considered state/tribal off-reservation fisheries management was *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968), hereinafter cited as *"Puyallup I"*. The Court based its thinking on the state's police power and said at p. 398:

> "[T]he manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians."

In *Antoine v. Washington*, 420 U.S. 194 (1975), hereinafter cited as *"Antoine"*, the Court dealt with a treaty which is not at issue in these proceedings but clarified its "appropriate standards" language in *Puyallup I*. The Court said at p. 207 that the phrase meant that the state must demonstrate that its regulation is a reasonable and necessary conservation measure, *and* that its application to the Indians is necessary in the interest of conservation.

In *Washington Game Dept. v. Puyallup Tribe*, 414 U.S. 44 (1973), hereinafter cited as *"Puyallup II"*, the Supreme Court considered the meaning of "discrimination" with respect to state management of off-reservation Indian fishing and also elaborated on the conservation objective. With regard to the first question, the Court said at p. 48 that the state was not free to achieve conservation by restricting Indians alone. Rather, the state was obliged to strike a balance between regulation of Indian and non-

Indian fishermen such that conservation was achieved.

With respect to conservation, the Court said at p. 49:

> "Rights can be controlled by the need to conserve a species; and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets."

Although the Supreme Court has discussed the relationship between state and tribal off-reservation fisheries management authority in the cases referred to above, the trial judge's opinion in *U.S. v. Washington* remains the most comprehensive discussion of the subject. The judge decided that (i) the treaty tribes have full power to manage the treaty fishery in the off-reservation usual and accustomed grounds, 384 F. Supp. at p. 403; (ii) tribal power is not exclusive, but is concurrent with that of the state, 384 F. Supp. at p. 342; and (iii) the state's concurrent power is a power to regulate the *exercise* of off-reservation treaty fishing rights for the purpose of conservation, 384 F. Supp. at p. 403. Prior to exercising its limited concurrent authority, the state must show to the satisfaction of the Indian tribe concerned or to the federal district court that the state regulation is reasonable and necessary to prevent demonstrable harm to the actual conservation of fish, 384 F. Supp. at p. 342.

The term "conservation" is limited to those measures which are reasonable and necessary for the perpetuation of a particular run or species of fish, 384 F. Supp. at p. 342. The state may regulate off-reservation Indian treaty fishing only if alternative means for achieving conservation, such as regulating non-Indians, are insufficient, 384 F. Supp. at p. 342.

The Court of Appeals approved the trial judge's discussion of off-reservation management jurisdiction, reasoning that the federal government, in executing the treaties with the tribes in the first instance had preempted the normal exclusive authority which states have to regulate fisheries, and had converted it into a concurrent authority, 520 F.2d at p. 684. The state's concurrent power is limited to measures designed to prevent the destruction of a run of a particular species in a particular stream, 520 F.2d at p. 685. The Court of Appeals cited *Antoine*, saying at 520 F.2d 686:

> "Direct regulation of treaty Indian fishing in the interests of conservation is permissible only after the state has proved unable to preserve a run by forbidding the catching of fish by other citizens under its ordinary police power jurisdiction."

In addition to defining the governing relationship between state and tribes which had been set out by the Supreme Court in the cases cited above, the trial judge in *U.S. v. Washington* went beyond what was the settled law and said at 384 F. Supp. 340:

> "[T]his court hereby finds and holds that any one of plaintiff tribes is entitled to exercise its governmental powers by regulating the treaty right fishing of its members without any state regulation thereof."

The *exclusive* off-reservation tribal authority which was created by the judge was available to tribes which demonstrated the existence of six qualifications. These qualifications included the quality of the tribe's leadership and government, the existence of Indian enforcement personnel, the availability of fisheries experts, an approved tribal membership role, and a provision for a certification of tribal membership, 384 F. Supp. at pp. 340-341.

In addition, the trial judge ruled that any tribe which became fully and exclusively self-regulating was required to comply with three on-going conditions. These three conditions were that the tribe first, establish full and complete tribal fishing regula-

tions, which prior to adoption had been discussed with either WDF or WDG, and which included any state regulation which had been established to the satisfaction of the tribe or the court to be reasonable and necessary for conservation; second, permit monitoring of off-reservation Indian fisheries by WDG and WDF to the extent reasonable and necessary for conservation; and third, provide certain fish catch reports when requested by WDG or WDF, 384 F. Supp. at p. 341.

In reaching his decision with regard to exclusive self-regulating status, the judge relied on the Congressional policy of encouragement for the exercise of tribal autonomy and self-government, citing the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341, 384 F. Supp. at page 340. The judge relied on his equitable power to implement Congressional policy and indicated he would enjoin the state's concurrent power over off-reservation treaty fishing with respect to self-regulating tribes, 384 F. Supp. at p. 414. To date two tribes have achieved self-regulatory status, the Yakimas and the Quinaults, 384 F. Supp. at p. 342.

The Court of Appeals affirmed the trial court's discussion of the self-regulating tribes. It made clear that the state's concurrent power had not been displaced, but merely enjoined, 520 F.2d at p. 686. The appellate court did express concern over the novel relationship which the trial judge had set up between the self-regulating tribes and the state. In the event that tribal self-regulation did not prove practicable, the Court of Appeals felt certain that the trial court would revise its judgment, 520 F.2d at pp. 686-687.

3. The Federal District Court

The federal district court retained continuing jurisdiction over the litigation in *U.S. v. Washington*, 384 F. Supp. at p. 408. The court has issued a series of orders which have affected the ongoing jurisdiction of both the state and the

tribes, and which have increasingly made the court responsible for fisheries management in the case area. The court is unquestionably now serving as a fishery management institution.

The court began its involvement by serving as a depository for the management regulations filed with respect to off-reservation treaty fishing by both the state and the tribes. The state was required to establish either to the satisfaction of all affected tribes or to the court that conservation was involved prior to utilizing its concurrent authority and promulgating its off-reservation regulations for members of all tribes other than the Quinaults and the Yakimas, 384 F. Supp. at p. 342. The tribes, on the other hand, were also required to file their off-reservation regulations with the court prior to the effectiveness of those regulations, 384 F. Supp. at p. 420.

In October of 1974 the court issued an order giving the state the authority to regulate off-reservation treaty fishing for more than the conservation purposes which the court had identified in its original decision. The court said that WDF and WDG could restrict tribal fishing to insure that the tribes did not exceed the catch share provided by the federal court, (R. ....).

In October of 1975 the trial judge established the Fisheries Advisory Board as an arm of the court. The Board was composed of one member selected by the state, one member selected by the plaintiff Indian tribes, and one non-voting member appointed by the court, (R. ....). The purpose of the Board was to promote the increased communication and cooperation which the court had requested in its original decision, 384 F. Supp. at p. 418. The Board had the power to consider any matter regarding the fish re-

source that was submitted to it by the court or by the parties.

In December of 1976 the court modified its order relating to the Fisheries Advisory Board. It left the composition of the Board intact, but gave the Board a more precise role in the promulgation and enforcement of the state's conservation regulations. The court ordered that state regulation of off-reservation fishing would only be valid if the proposed regulations were first submitted to the Board 48 hours prior to the effective date of the regulation. If any party so desired, the Board would convene 24 hours or more prior to the effective date of the regulation. Any party to the proceeding could immediately request a court review if dissatisfied with the Board's recommendation, (R. ....).

In August of 1977 the court issued another important ruling which affected management jurisdiction. The court itself made the allocations which were to prevail between treaty and non-treaty fishermen, (R. ....). In its 1974 decision the court had made a determination concerning the treaty language but had not initiated an actual allocation of the catch. The state still retained the ability to manage non-Indians in general and Indians for conservation purposes at off-reservation locations.

In June of 1978 the court issued a ruling which further involved the court in the management process. At that time the court took active control of the non-Indian fishery for allocation purposes, (R.....). The state retained exclusive jurisdiction over non-Indians for conservation purposes and concurrent jurisdiction for conservation purposes over off-reservation treaty fishing.

4. Regional Fishery Management Councils

The Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1801, *et seq.*, hereinafter cited as "FCMA", created the Pacific and North Pacific Fishery Management Councils. The Councils are state/federal institutions responsible for developing fishery management plans for fisheries off the coasts of Washington, Oregon, and California (Pacific Council) and Alaska (North Pacific Council), 16 U.S.C. § 1852. The Councils' authority over salmon and steelhead fisheries begins 3 miles from the coast of the respective states, 16 U.S.C. § 1852, and extends throughout the range of the fish except when found within the fishery conservation zone or territorial sea of another nation, 16 U.S.C. § 1812.

The Secretary of Commerce adopts final regulations implementing the Councils' fishery management plans, 16 U.S.C. § 1855. The regulations are enforced by the National Marine Fisheries Service, and the Coast Guard, 16 U.S.C. § 1861. The Secretary has additional authority by virtue of 16 U.S.C. § 1856(b)(A) and (B) to preempt the states' management authority within three miles of the respective coasts in fisheries which are engaged in predominately beyond three miles. Preemption may occur after the Secretary has found that a state's action or inaction in managing fishery resources within three miles conflicts with the way in which those resources are managed by a Council beyond three miles. After the Secretary has preempted state jurisdiction, the FCMA contemplates that the appropriate Council will then assume jurisdiction, at least until the state's action or inaction no longer conflicts with the Council's management plan, 16 U.S.C. § 1856.

Secretarial preemption does not, however, extend to

state jurisdiction for the management of fisheries resources within the internal waters of the states, 16 U.S.C. § 1856 (b)(B). In Washington, Grays Harbor, the Strait of Juan de Fuca, and Puget Sound are internal waters.

5. International Pacific Salmon Fisheries Commission

The International Pacific Salmon Fisheries Commission, hereinafter referred to as "IPSFC", is an international agency which was established by Convention between the United States and Canada to manage the sockeye salmon fisheries for the stocks of the Fraser River in British Columbia. The Convention was signed on May 26, 1930, and entered into force on July 28, 1937, 50 Statutes at Large 1355, Treaty Series No. 918. A Protocol amending the Convention was signed on December 28, 1956 and entered into force on July 3, 1957, 8 UST 1057, TIAS 3867. The Protocol extended the Commission's authority to include pink salmon as well as sockeye salmon. In 1947 the United States enacted what was to become known as the Sockeye or Pink Salmon Fishing Act and which now appears as 16 U.S.C. §§ 776-776f. The Act, as amended, makes it unlawful for any person to engage in fishing for sockeye salmon or pink salmon in Convention waters in violation of the Convention, the Act, or any regulation of the Commission, 16 U.S.C. § 776a.

Pursuant to the terms of the Convention, the IPSFC has extensive power to manage sockeye and pink salmon fisheries for stocks bound for Canada's Fraser River. Specifically, the Convention authorizes the IPSFC to limit or prohibit the taking of sockeye and pink salmon in Convention waters by vessels of any nation, or on the high seas by vessels of the U.S. or Canada. Convention waters are located within the state of Washington in northern Puget Sound, as well as within the province of British Columbia, and are shown in Appendix III, *infra*.

The Convention contemplates the development of harvest regulations by the Commission and directs that fishermen of Canada and the U.S. each take 50% of the harvestable portion of the resource. The proposed harvest regulations are, in turn, approved by the two governments. Until 1976 the regulations pertaining to U.S. fishermen were then adopted and enforced by WDF pursuant to the authority contained in RCW 75.40.060.

In 1976 the Commission's proposed regulations contained the following language:

> "Insofar as the foregoing regulations prescribe the type of gear to be used during times open to fishing for sockeye and pink salmon, such regulations shall be implemented to the extent permissible under the laws of the Parties."

After U.S. approval, WDF adopted the proposed regulations.

The National Marine Fisheries Service interpreted the quoted language to mean that tribal members were entitled to fish in 1976 on IPSFC stocks at any time open for fishing by any type of U.S. gear, Federal Register, Vol. 41 No. 108, pp. 22392-22393, June 3, 1976. Enforcement of the IPSFC regulations in 1976 was provided jointly by federal and state enforcement officers.

In 1977 the United States approved the proposed IPSFC regulations except as they applied to treaty tribes. The National Marine Fisheries Service utilized its authority under the Sockeye Salmon or Pink Salmon Fishing Act and adopted the IPSFC regulations relating to non-treaty fisher-

men, Federal Register, Vol. 42, No. 117, pp. 30841-30842, June 17, 1977. The Bureau of Indian Affairs utilized its authority in 25 U.S.C. § 2 and § 9 and adopted federal regulations governing IPSFC fishing by treaty fishermen, Federal Register, Vol. 42, No. 119, pp. 31450-31453, June 21, 1977. All regulations were enforced by the federal government. The same procedure was followed in 1978, Federal Register, Vol. 43, No. 121, pp. 26737-26739, June 22, 1978 and No. 122, pp. 27187-27189, June 23, 1978.

The involvement of WDF in the IPSFC fishery has declined dramatically since 1976. WDF did not adopt the IPSFC's regulations in 1977 or in 1978. In both those years the implementation of the Commission's regulations has been essentially a federal activity. The Washington Supreme Court rendered a decision in *Purse Seine v. Moos*, 88 Wn.2d 799, 567 P.2d 205 (1977), which further restricted WDF. The state court held that the grant of authority in RCW 75.40.060 for WDF to adopt the Commission's regulations did not give WDF the power to expand, diminish, or alter those regulations in any respect. Rather, the authority empowers WDF to incorporate in its regulations every provision of the IPSFC regulations and to do no more than that, 88 Wn.2d at p. 808.

6. Federal Agencies

Various agencies of the federal government now take an active role in fisheries management in the Pacific Northwest. The regulations of the Secretary of Commerce implement the fishery management plans of the Councils beyond three miles. The Pacific Council has such a plan in effect for the offshore salmon fishery.[20] The National

20. *Commercial and Recreational Salmon Fisheries off the Coasts of Washington, Oregon, and California Commencing in 1978*, March, 1978.

Marine Fisheries Service and the Bureau of Indian Affairs adopt regulations for the IPSFC fishery for the non-Indians and Indians respectively. Enforcement of all federal regulations as well as of the orders of the federal district court in *U.S. v. Washington* is provided by the National Marine Fisheries Service and the Coast Guard.

7. Canada

Canadian fishery management authority is exercised by the Fisheries and Marine Services division of the Department of the Environment under the provisions of the Fisheries Act of Canada, Chapter F-14, Revised Statutes of Canada (1970). Canada claims a counterpart to the U.S. 200-mile fishing conservation zone. The U.S. disclaims authority over salmon and steelhead while in the Canadian zone, 16 U.S.C. § 1812.

IV. Scientific Argument

The current management system stands in the way of effective fisheries management. In view of the proliferation of regulators and regulations, the system is not capable in the long run of preserving the salmon and steelhead resources or accomplishing the more complicated objectives of maximization of the yield or allocation of the catch.

The jurisdictional defects in the present system are exacerbated by the special characteristics of the fish and the fishermen which the system is charged with managing. The fish are highly migratory, but uniquely vulnerable in that they congregate in areas where they may be easily and rapidly captured. The spawning cycle, the many distinct stocks to be protected, and the relationship in these species of numbers of spawners to numbers of progeny, all serve to increase the damage from over fishing and

complicate yield maximization and allocations among user groups. On the other side of the equation, the fishermen are numerous, far-flung, mobile, and efficient. A miscalculation or delay in developing and implementing a cohesive management plan can result in catches of fish that are far wide of the goals.

Salmon and steelhead fisheries present four special problems for resource managers. These problems relate first, to data collection and analysis, second, to regulation of fishermen for conservation, yield maximization, and catch allocation purposes, third, to the mixed stock character of the fishery, and fourth, to enforcement. Because of these problems, fragmented management authority over a common stock or stocks distributed among multiple jurisdictions, as currently exists, is an ineffective mechanism for managing fisheries.[21]

1. Data Collection and Analysis

Salmon and steelhead management depends on the collection and analysis of a wide variety of scientific data including data relating to catch and effort. The adjustments in regulations which occur while the fishery is in progress are based on these data. The catch and effort data must be rapidly collected from *all* fishermen and must be analyzed with equal dispatch to obtain accurate estimates of run size. The present system is characterized by the independent collection of catch and effort information by a variety of entities. If the data which are collected must be analyzed and transmitted among a mul-

21. Wenk, Edward Jr., 1972. *The Politics of the Ocean*, University of Washington Press, p. 304. See also Alverson and Paulik, *supra* note 14, at 1941-1942.

tiplicity of institutions, the critical decisions cannot be made in a timely fashion and interpretive and communicative mistakes will occur.

2. Regulation of Fishermen

Fishing regulations are designed to achieve conservation first, and yield maximization and allocation second. If different institutions manage different fishermen fishing on the same stocks, the achievement of these goals will be hindered. This will occur either because the institutions interpret the data differently, do not agree on the goals, or simply fail to successfully coordinate their efforts.

The key to successful management is prompt, coordinated regulation of all sources of fishing effort. If the regulations are not timely or if they do not result in control of fishing effort in the manner expected, the goals will not be achieved.

One of the specific goals of fishery management is allocation of the resource among user groups. This goal is especially unattainable under a fragmented system of management because different user groups fish in sequence and the earlier user groups fish on mixed stocks. In these circumstances the earlier fisheries must be restrained in a manner sufficient so as to permit an escapement of each stock sufficient to meet the allocation for subsequent fisheries as well as spawning requirements. This is nearly an impossible task unless the managers can make various "mid-course corrections" as the different user groups harvest the incoming resources. This in turn is fully possible only under a unified management system.

3. Mixed Stocks

Fisheries for salmon and steelhead occur while different stocks are mixed together. This factor presents fisheries managers with a unique problem. Because the different stocks do not tolerate the same harvesting rate, the mixed stock fisheries must be regulated in a coordinated fashion and in a manner which takes into account the fisheries which occur after the stocks have separated so that the overall harvest rate is consistent with management goals. The complex and coordinated decisions required to deal with this problem can best be accomplished by a unified management system which can exercise control over all the relevant fisheries. If the management of *all* fisheries, those that occur on stocks while mixed and those that occur when stocks have separated, is not consistent, over- and under-harvesting will occur to the subsequent detriment of the stocks.

4. Enforcement

Enforcement is critical to the success of a management regime, particularly one relating to anadromous species which are so vulnerable to over-fishing. When each agency, state, tribe, nation, court, regional group, or international body attempts to enforce its own regulations or orders against a discrete group of fishermen, serious problems arise. These result from the difficulties of distinguishing one fisherman from the next and of detecting and apprehending violations when they do occur. In addition, the multiplicity of jurisdictional boundaries complicates enforcement.

V. Summary of Legal Argument

1. *A Unified Management System is Necessary in Order to Best Effectuate Treaty Rights of Both Indians and Non-Indians.*

a. The treaty rights here under review are ones to "take fish." Diminution of the resource diminishes these rights. A unified management system offers the best chance that the resource will not be diminished.

b. The Court may find that, as a matter of law, treaty-right fishermen are entitled to an opportunity to take a certain percentage of the harvest. An inability to properly allocate this opportunity will necessarily deny one group or the other its treaty rights. A unified management system can best accomplish this allocation.

c. The Court's obligation is to determine treaty rights and to frame relief that will implement those rights. In order to fulfill the latter duty, the Court should take such steps as it can to see to the establishment of a unified management system.

2. *The Court Should Give Effect to Clearly Stated Congressional Policy with Regard to Fishery Resources and the Environment.*

a. The FCMA establishes a clear Congressional policy that salmon and steelhead should be conserved.

b. The Court should heed this Congressional policy in framing its decision in this case.

c. The FCMA also contains policy language favoring unified management systems.

3. *This Court Has Recognized a Judicial Duty to Conserve Renewable Fishery Resources.*

a. States have a common law duty to manage wild game and fish as a public trust for the benefit of the people.

b. This duty requires that the salmon and steelhead resources in the case area be managed so as to ensure their preservation.

c. This Court, in a number of cases, has implicitly recognized a judicial responsibility, in the nature of the public trust duty, to conserve renewable fishery resources.

d. These cases are clear precedent for the Court to take such steps as possible toward establishment of a unified management system in order to preserve the salmon and steelhead resources.

VI. Legal Argument

This section will discuss why, as a matter of law, this Court should seek the establishment of a unified management system.

1. A Unified Management System is Necessary in Order to Best Effectuate Treaty Rights of Both Indians and Non-Indians

The District Court and the Ninth Circuit have held that the treaties to be construed in this case represent a grant of rights from the Indians to the settlers and their descendants, and a reservation of rights not granted, 384 F. Supp. at p. 331, and 520 F.2d at p. 684, both quoting with approval *United States v. Winans, supra.*[22] In each case the right was, by the words of the treaties, one to "take fish". Whatever judicial gloss may be placed on these words, the Indians' and the non-Indians' rights to "take fish" can be exercised only so long as there are fish to take. If, as a result of mismanagement, the salmon resource is rendered extinct,

22. For purposes of the argument herein being made, it is irrelevant whether the non-Indians have a "right" to take fish or, as the District Court in this case found, only a a "privilege which may be granted, limited, or withdrawn by the state . . ." 384 F. Supp. at p. 332.

the net sum of the treaty rights of Indians and non-Indians would be extinguished. Analogously, diminution of the resource diminishes the net sum of treaty rights. The Institute has argued in previous sections that the structure of the management system is crucial to the conservation of the resource. A unified management system offers the best chance that the salmon or steelhead stocks will not be rendered extinct or greatly diminished due to management errors and thus the best chance that the treaty rights of both Indians and non-Indians can be implemented.

The Institute has also argued that the allocation of the harvestable yields of the salmon and steelhead among user groups can best be accomplished by a unified management system. It is possible that this Court will find that, as a matter of law, treaty right fishermen are entitled to an opportunity to take a certain specified percentage of the available harvest. In these circumstances, an inability of the management system to allocate this opportunity properly will necessarily deny one group or the other its fishing rights.

Viewed in this light, a unified management system is necessary in order to best effectuate the treaty rights of all persons fishing for salmon and steelhead in the case area. This Court's fundamental obligation in this litigation is to determine what those treaty rights are and to frame relief for the parties that will serve to implement those rights. In order to properly fulfill this duty, this Court should take such steps as it can to see to the establishment of a unified management system.

2. The Court Should Give Effect to Clearly Stated Congressional Policy With Regard to Fishery Resources and the Environment

The FCMA establishes a very strong and clear Congressional policy that anadromous species which spawn in U.S. waters should be conserved. Section 2 of the Act, 16 U.S.C. § 1801, provides in pertinent part as follows:

"(a) FINDINGS.—The Congress finds and declares the following:

> (1) The fish off the coasts of the United States, the highly migratory species of the high seas, the species which dwell on or in the Continental Shelf appertaining to the United States, and *the anadromous species* which spawn in United States rivers or estuaries, constitute valuable and renewable natural resources. These fishery resources contribute to the food supply, economy, and health of the Nation and provide recreational opportunities.
>
> ° ° °
>
> (5) Fishery resources are finite but renewable. If placed under *sound management* before overfishing has caused irreversible effects, the fisheries can be conserved and maintained so as to provide optimum yields on a continuing basis." (Emphasis added.)

These words in the legislation embody the Congress's unmistakeable concern that the resources which are the subject of this litigation be "conserved and maintained". In addition, they indicate the Congress's belief that such conservation and maintenance is possible if the fishery resources are "placed under sound management."

Although the FCMA is perhaps the clearest expression of national policy with regard to salmon and steelhead conservation, the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.*, and the Endangered Species

Act of 1973, 16 U.S.C. § 1531 *et seq.*, also express clear Congressional policies in favor of resource conservation.

The Court, in resolving this dispute, is thus confronted with a Congressional policy that the salmon and steelhead resources are to be conserved. This Court may take judicial notice of federal statutes, *St. Louis, I.M. & S.R. Co. v. Starbird*, 243 U.S. 592 (1917); *Missouri, K & T.R. Co. v. Wulf*, 226 U.S. 570 (1913); *Spokane Falls & N.R. Co. v. Ziegler*, 167 U.S. 65 (1897), and in particular public policy as stated in federal statutes, *Helvering v. Sabine Transp. Co.*, 318 U.S. 306 (1943); *United States v. Darby*, 312 U.S. 100 (1941). Since the Court's ruling in this case will inevitably have a significant impact on resource conservation, the Court ought to heed the clear expressions of Congressional policy on this issue in framing its decision.

The FCMA also contains policy language which bears directly on the management issue. Section 301 of the Act, 16 U.S.C. § 1851, sets forth "national standards for fishery conservation and management." One of the national standards enunciated is the management of each stock of fish as a unit throughout its range. Section 301 provides in part as follows:

> "(a) IN GENERAL—Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this title shall be consistent with the following *national standards* for fishery conservation and management;
>
> ° ° °
>
> (3) To the extent practicable, an individual stock of fish shall be managed *as a unit throughout its range*, and interrelated stocks of fish shall be managed as a unit or in close coordination." (Emphasis added.)

A unified management system for the salmon and steelhead resources involved in this litigation would be consistent with and a substantial step towards fulfilling this declared national standard of managing the fish as a unit throughout their range.

3. This Court Has Recognized a Judicial Duty to Conserve Renewable Fishery Resources

In the landmark case of *Geer v. State of Connecticut,* 161 U.S. 519 (1896), this Court first clearly articulated the authority of the several states with regard to wild animals. The case concerned whether the state of Connecticut had the legal authority to regulate the interstate transportation of wild game killed within its borders. In deciding this question in favor of Connecticut, the Court found that wild game is a "common property" owned by the states which the states have the right to regulate "as a trust for the benefit of the people", 161 U.S. at p. 529.

The concept that wild animals and fish are "owned" by the states has been rejected by this Court in a series of cases in which states have attempted to rely on ownership to justify regulation of fish and wild game in a manner found to be inconsistent with the Constitution or federal legislation.[23] However, the concept that the state must exercise it regulatory authority as a public trust for the benefit of the people has never been seriously challenged. It is accepted law in the state of Washington, *State ex rel. Campbell v. Case,* 182 Wash. 334, 47 P.2d 24 (1935); *State ex rel. Bacich v. Huse,* 187 Wash. 75, 59 P.2d 1101 (1936).

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23. *Toomer v. Witsell,* 334 U.S. 385 (1948); *Takahashi v. Fish and Game Commission,* 334 U.S. 410 (1948); *Douglas v. Seacoast Products, Inc.,* 97 S.Ct. 1740 (1977).

The public trust doctrine received support in a recent District Court case, *State of Maryland, Dept. of N. Res. v. Amerada Hess Corp.,* 350 F. Supp. 1060 (D. Maryland 1972). This case concerned whether the state of Maryland could maintain a common-law action against a defendant tanker corporation and others for damages for pollution of state waters and consequent injury to natural resources. In finding that the state had standing to bring this suit, the court at p. 1067 quoted with approval from Justice Frankfurter's concurring opinion in *Toomer v. Witsell, supra:*

> "A State may care for its own in utilizing the bounties of nature within her borders because it has technical ownership of such bounties or, when ownership is in no one, because the State may for the common good exercise all the authority that technical ownership ordinarily confers. 334 U.S. at 408, 68 S.Ct. at 1168."

The court then went on as follows:

> "It is just this 'technical ownership' that the State of Maryland has in its waters that gives it the legal right to bring suit on behalf of the public in order to serve the 'common good' of its citizens. The conclusion seems inescapable to this Court, that if the State is deemed to be the trustee of the waters, then, as trustee, the State must be empowered to bring suit to protect the corpus of the trust—i.e., the waters—for the beneficiaries of the trust—i.e., the public."

The public trust doctrine requires government to exercise its control over renewable resources for "the common good." The common good requires the preservation of the salmon and steelhead resources in the case area. Failure to manage these resources so as to ensure their preservation under present circumstances would be a clear breach of government's duty to its citizens.

The public trust doctrine has been couched by the

courts as a duty of the various states since these have been the governing units with the authority to regulate the fish and wild game in these cases. However, the courts implicitly have recognized that a duty to conserve applies to their judicial activities as well. In fact, this Court has in several important cases recognized a responsibility on its part to give heavy weight to resource preservation. It should be noted that in none of these was the Court dealing with any legislative enactments favoring preservation.

The first of these cases is *New York ex rel. Kennedy v. Becker*, 241 U.S. 556 (1916). This case involved Indian treaty fishing rights. The Seneca Nation in 1797 entered into a treaty with one Robert Morris, ceding certain land to him, "his heirs and assigns forever." The grant reserved to the Seneca nation and its heirs "the privilege of fishing and hunting on the said tract of land hereby intended to be conveyed." Three Seneca Indians were arrested for fishing off their reservation but on the ceded land in a manner contrary to the conservation laws of the state of New York. The Indians sought a writ of habeas corpus, arguing that the terms of the treaty created dual sovereignty to govern fishing activities on the ceded land. The Court rejected this argument, holding that the state had authority to regulate fishing on this property.

We wish to draw attention not to this result, but to the reasoning by which the Court reached it. The Court essentially reasoned that interpretation of the treaty to require dual sovereignty was unacceptable because such a result would destroy the resource. That is, the Court recognized a clear obligation to protect the resource even though this issue was not directly before the court nor mandated at the time by applicable federal law.

Chief Justice White, writing for the Court, put the matter as follows at p. 563:

> "It is said that the state would regulate the whites and that the Indian tribe would regulate its members, but if neither could exercise authority with respect to the other at the *locus in quo*, either would be free to destroy the subject of the power. Such a duality of sovereignty, instead of maintaining in each the essential power of preservation, would in fact deny it to both. . . . We do not think that it is a proper construction of the reservation in the conveyance to regard it as an attempt either to reserve sovereign prerogative, or so to divide the inherent power of preservation as to make its competent exercise impossible."

Kennedy v. Becker is also the only case which the Institute has discovered in which this Court has expressed an opinion on the ability of a non-unified management system to ensure preservation of fishery resources. The Court believed that division of the power of conservation would "make its competent exercise impossible." The Institute believes the same is true today, and suggests that *Kennedy v. Becker* offers an excellent precedent for a similar conclusion from the Court here.

The Court has recently been called upon to resolve disputes in three related cases in which, like *Kennedy v. Becker*, the issue was the authority of states to regulate fishing by Indians guaranteed the right by treaty to fish "at all usual and accustomed places, in common with the citizens . . ." *Puyallup I, Puyallup II, Puyallup III, supra.* This Court in these cases consistently held that the states have the authority to regulate treaty right fishing in non-exclusive areas as necessary and reasonable for *conservation.* It is instructive to note that in similar cases the Court has held that state regulation for other purposes,

such as the collection of a license fee, is impermissable, *Tulee v. Washington, supra.*

Once again, we wish to call attention not so much to the holdings themselves as to the reasoning the Court employed. The *Puyallup* cases involve interpretations of treaty rights between sovereigns. The treaty makes no reference to resource conservation, but the Court in each case has interpreted treaty rights so as to assure preservation of the resource. Although never stated explicitly, what the Court has consistently done is recognize and give effect to a perceived duty to conserve the renewable fishery resources which were the subject of those disputes as well as the present proceedings. For all of the reasons already stated above, we believe this duty is correctly perceived.

The present controversy before this Court presents an opportunity for the Court once again to recognize and give effect to an important resource conservation issue. We submit that the judicial reasoning in the treaty rights cases which this Court has previously resolved provide an overwhelming basis for the Court in this controversy to take such steps as necessary to establish a unified management system in order to best ensure preservation of the salmon and steelhead resources.

VII. Conclusion

The Institute has argued that the current balkanized system for management of the salmon and steelhead resources of western Washington is inadequate. In part as a result of the lower court decisions in this case, management authority is spread among too many entities. As a result, the system is incapable of ensuring the preservation of the resources, optimization of yields, or allocation of the catch among user groups.

It is admitted that preservation of the salmon and steelhead resources, optimization of yield, and allocation are ancillary issues in this litigation. Nonetheless, they bear directly upon the treaty rights which are the fundamental issue before the Court. In addition, preservation of these resources is of itself a matter of great importance and one that this Court has recognized and given great weight to in past rulings.

The Institute has attempted to demonstrate that a unified managament system is essential in order to achieve the management goals of resource preservation, yield maximization, and user group allocation. Full realization of such a management system goes beyond the bounds of this litigation and the duties of the Court. It is undoubtedly true that the Court could seek to remedy the institutional fragmentation that has resulted in part from the lower court decisions by confirming greater authority in the District Court to oversee and manage the fisheries. This is an unnatural role for the judiciary, and one to which it is not well-suited. The Institute agrees with Judge Burns in his concurring opinion in the Ninth Circuit's ruling in *U.S. v. Washington*:

"Although I recognize that district judges cannot

> escape their constitutional responsibilities, however unusual and continuing the duties imposed upon them, I deplore situations that make it necessary for us to become enduring managers of the fisheries", 520 F.2d at p. 693.

Creation of a unified management system for salmon and steelhead resources is a task for the United States Congress. There is no question but that this Court has the right to request that Congress legislate on this matter. Given, however, that a unified management system is a necessary condition to resource preservation and other management goals, and given that these goals are intimately bound up with the treaty rights here under litigation, the Institute submits that the Court has a duty to urge upon the Congress that it establish a unified management system for the fishery resources here being disputed. This Court can make an indispensable contribution by informing the Congress of the importance of such action from the Court's unique judicial perspective.

The Institute offers the following principles which the Court might use in requesting Congressional action:

1. The management system should have the capability to rapidly collect and analyze statistical information including catch and effort data from all fishermen exploiting the resource.

2. The management system should be capable of making coordinated decisions for regulating the activities of all fishermen and should have the authority to conserve the resources, maximize the yield, and allocate the permissible catch among user groups in a fair and equitable manner according to law.

3. The management system should be able to make

rapid and timely adjustments to regulations while each run and each fishery are actually in progress.

4. The management system should have the ability to enforce decisions and regulations with regard to all fishermen.

Respectfully submitted,

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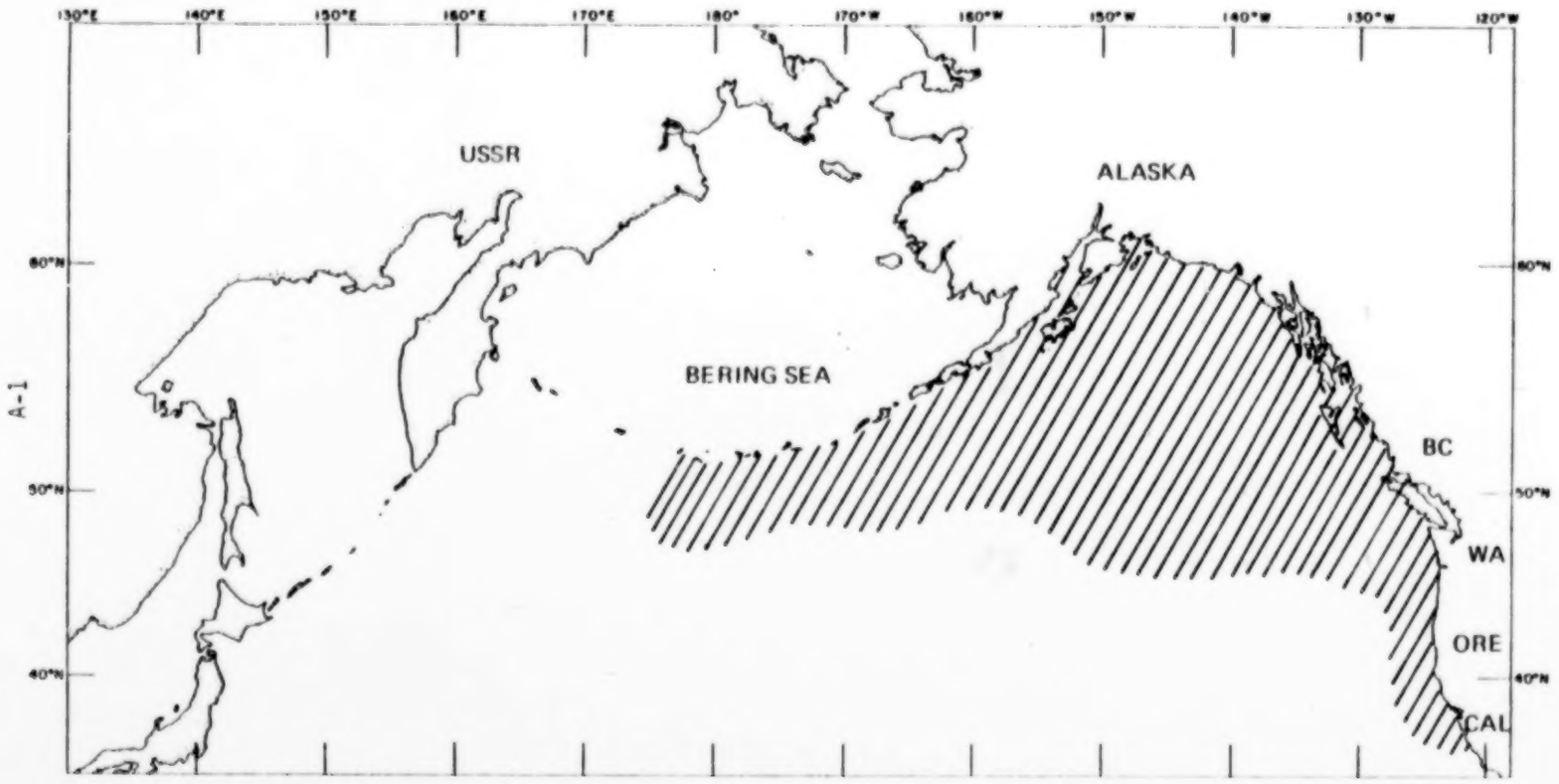
Counsel for *Amicus Curiae*

Seattle, Washington
November, 1978

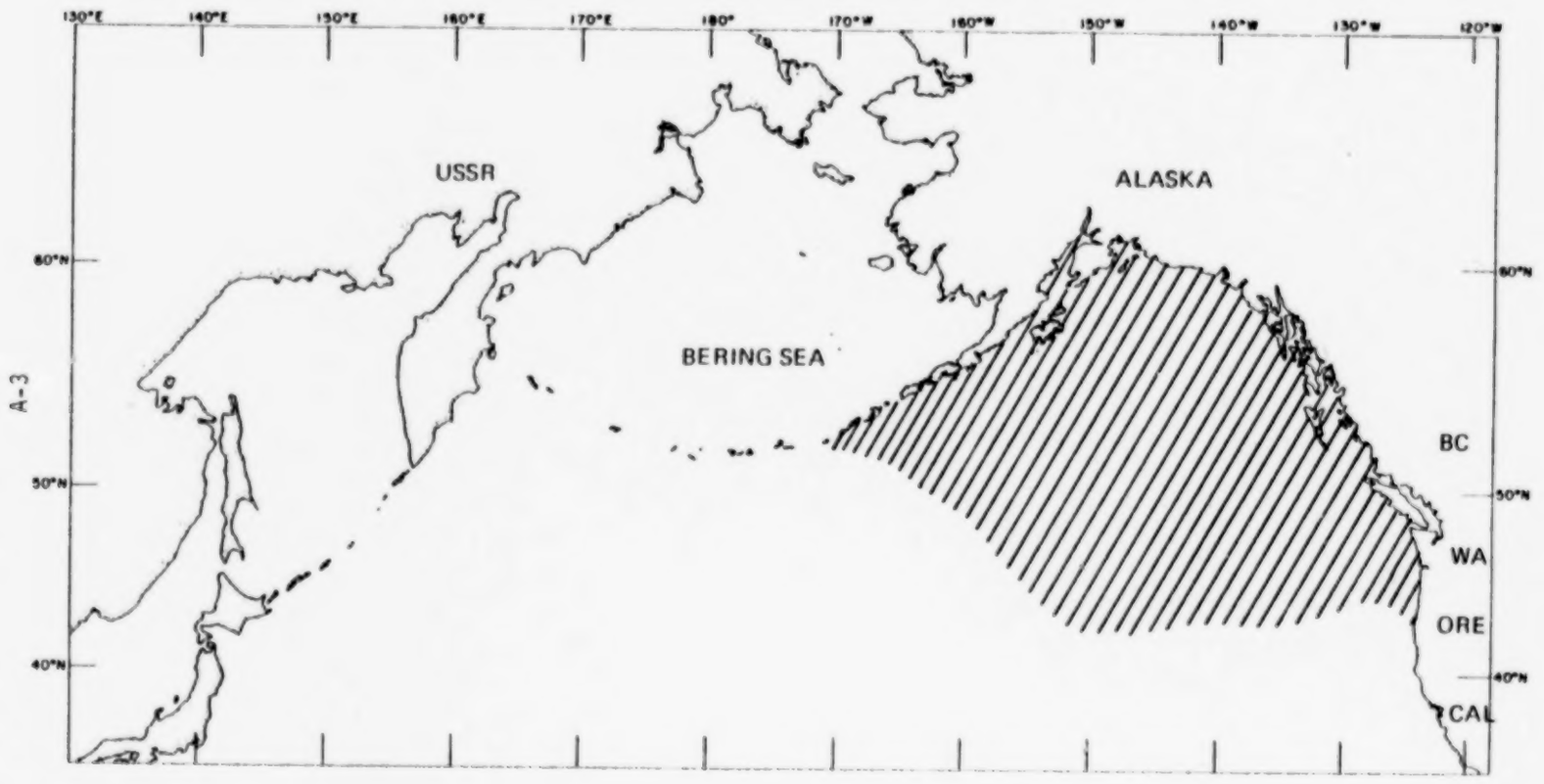
APPENDIX I

pages A1 - A6

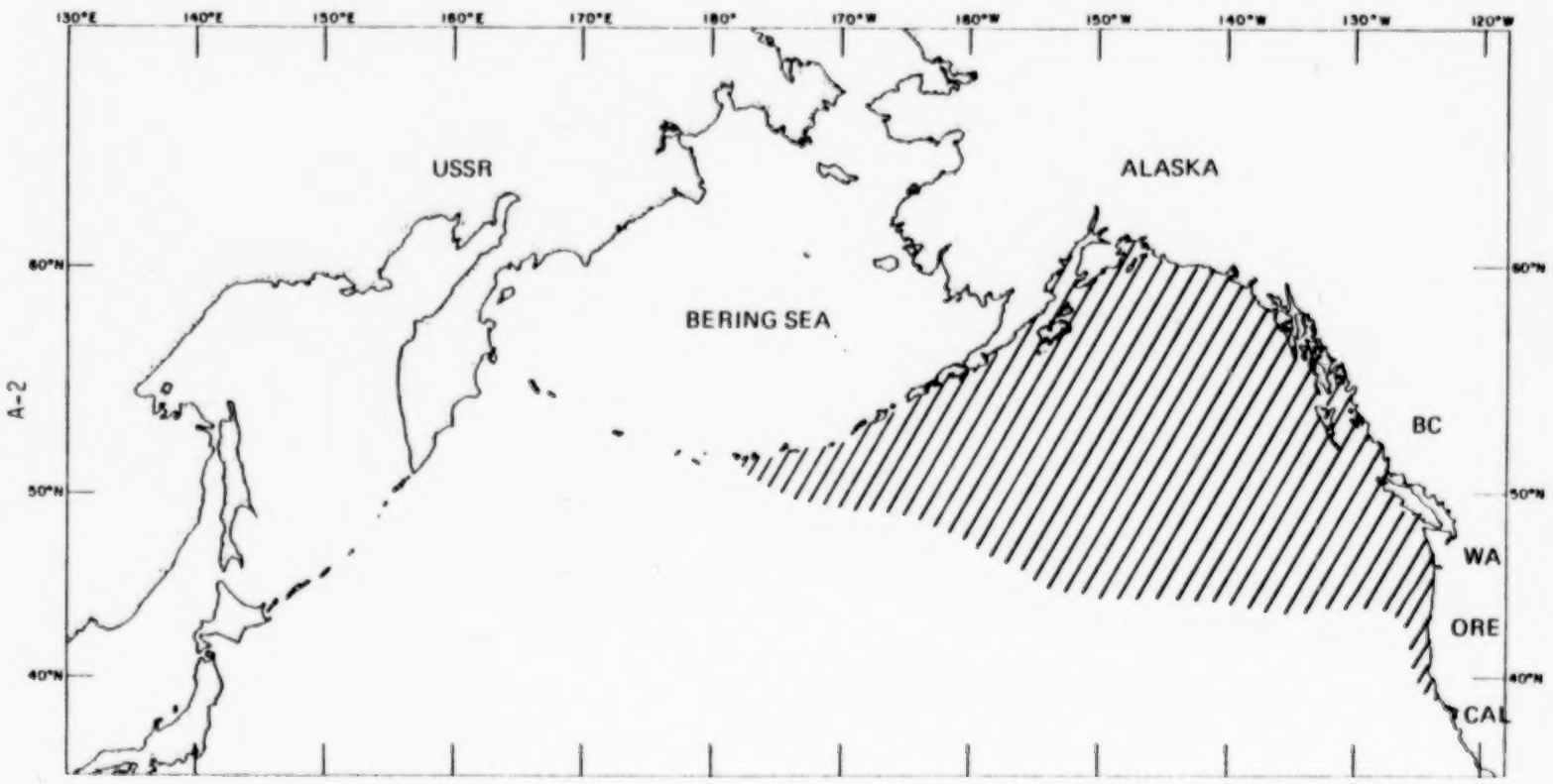
Ocean distribution of chinook salmon from tributaries emptying into the Gulf of Alaska and from waters of Washington, Oregon, and California.



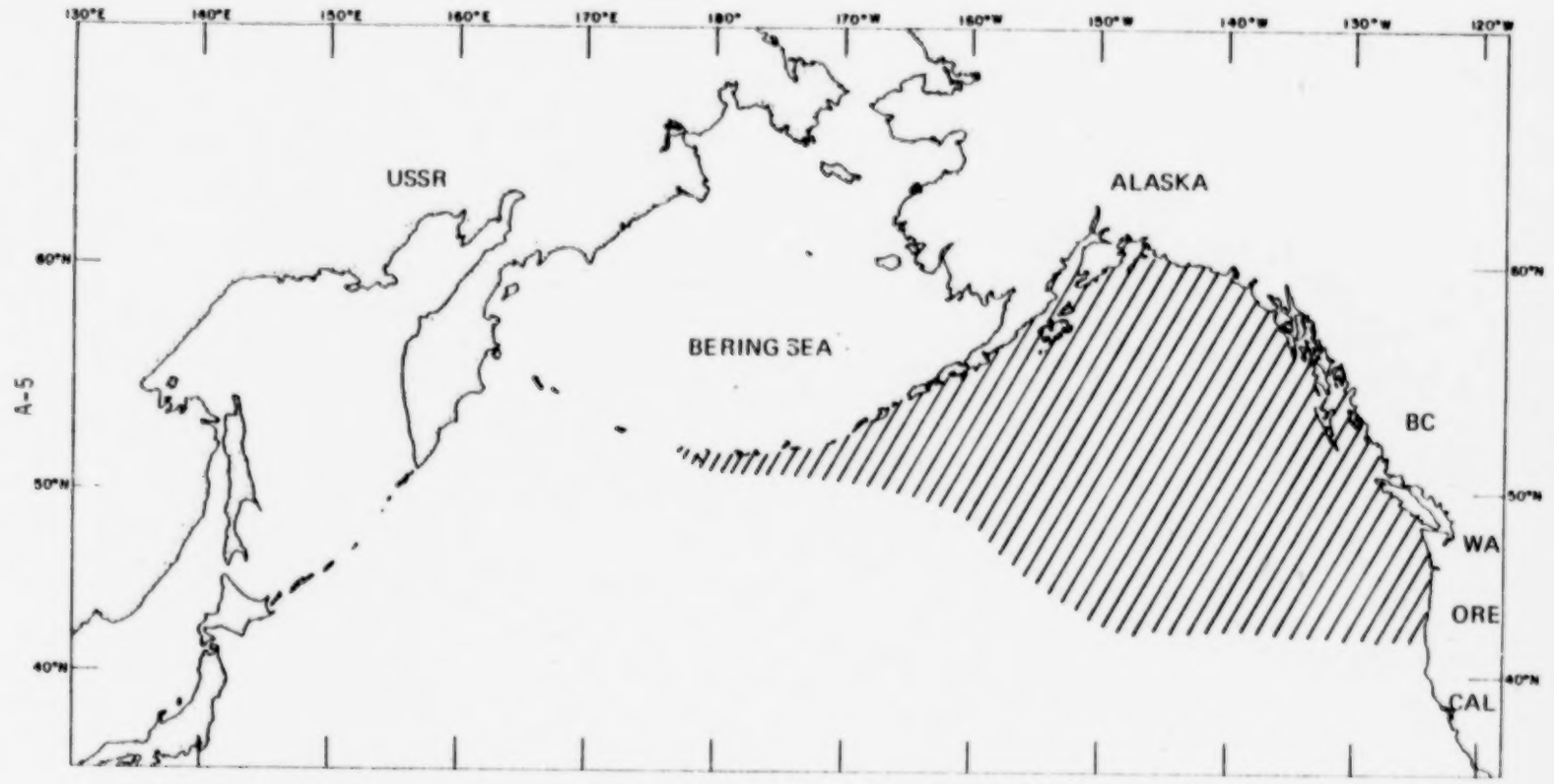
Ocean distribution of pink salmon from tributaries emptying into the Gulf of Alaska and from waters of Washington.



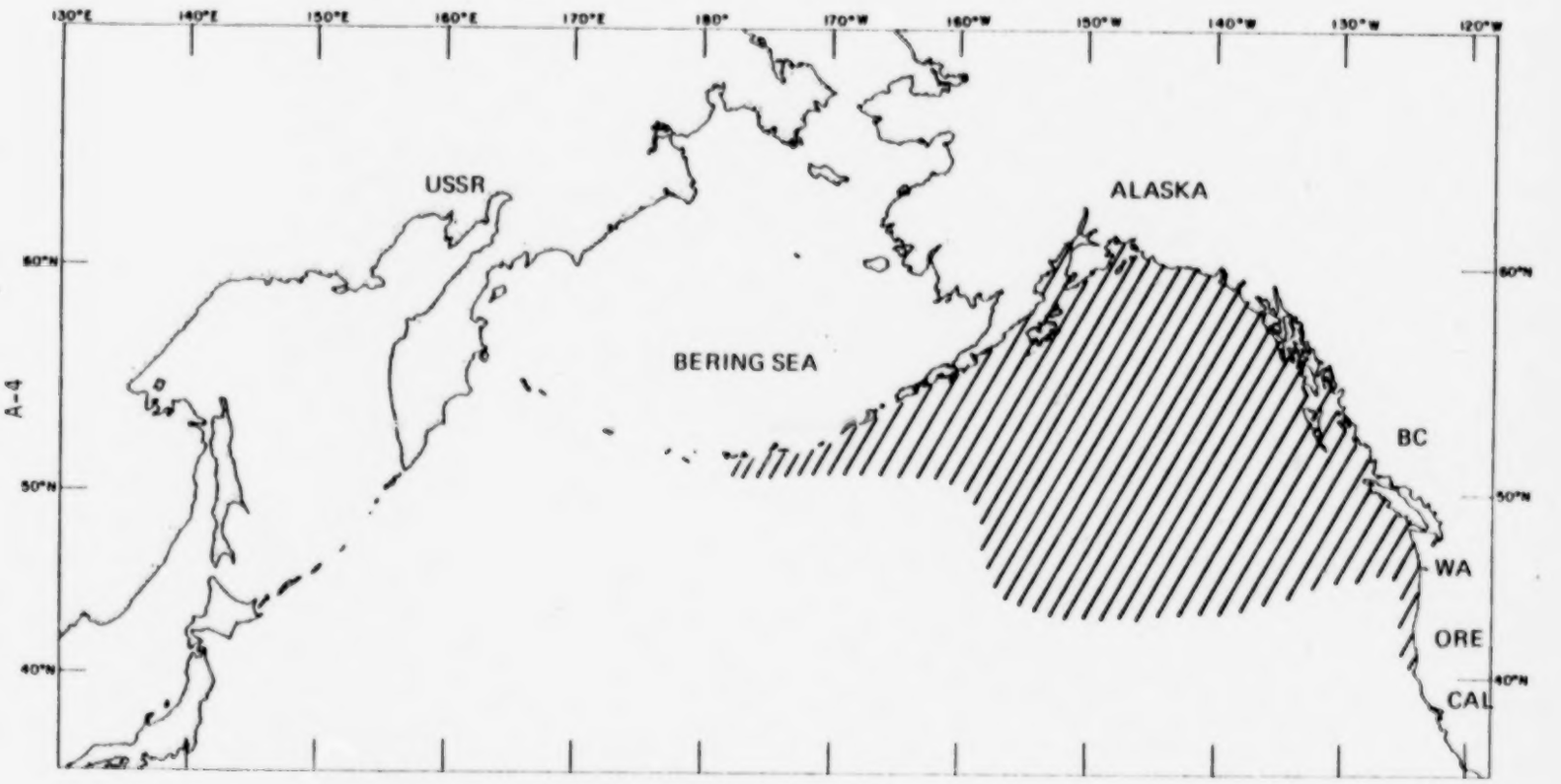
Ocean distribution of coho salmon from tributaries emptying into the Gulf of Alaska and from waters of Washington, Oregon, and California.



Ocean distribution of sockeye salmon from tributaries emptying into the Gulf of Alaska and from waters of Washington and Oregon.



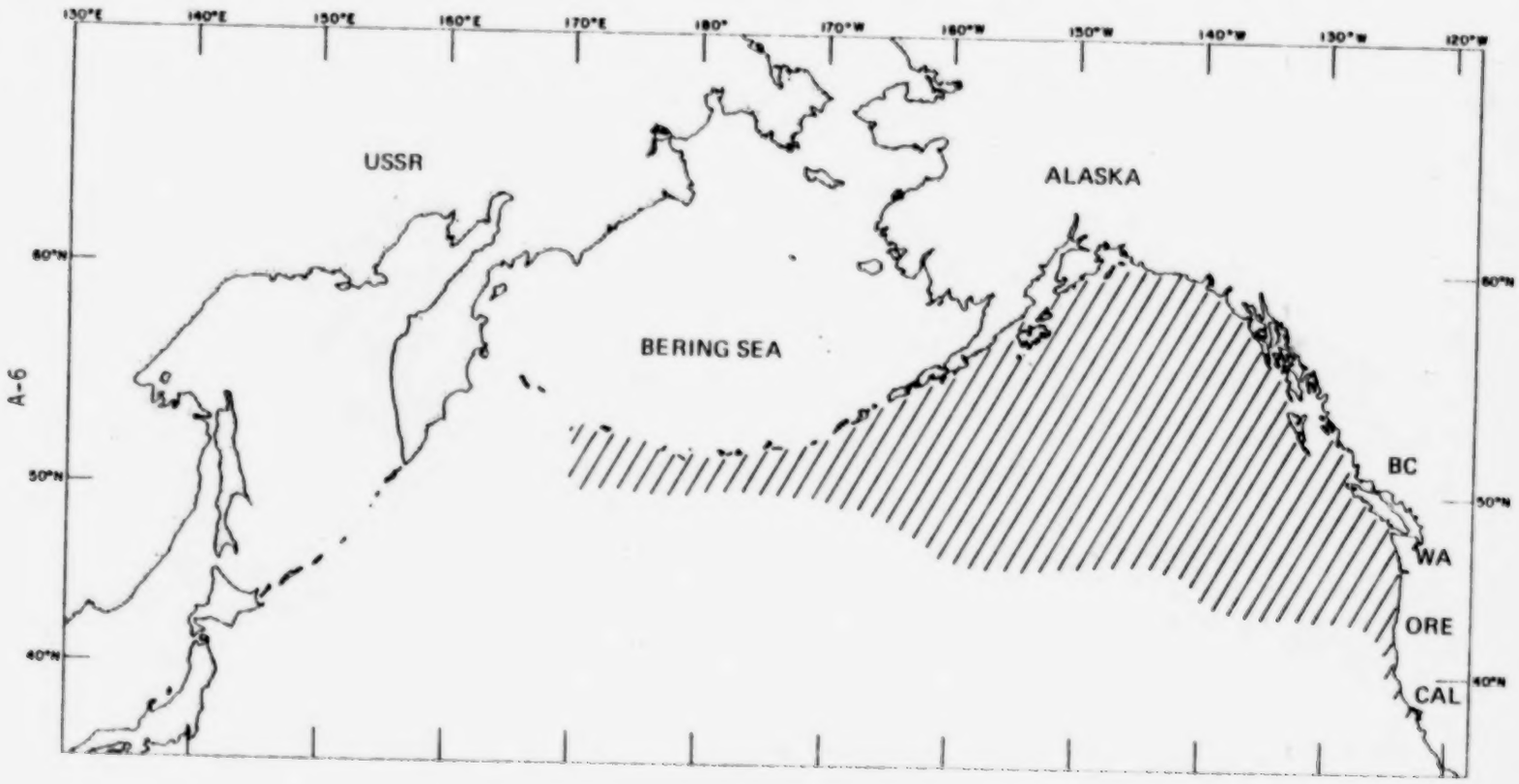
Ocean distribution of chum salmon from tributaries emptying into the Gulf of Alaska and from waters of Washington and Oregon.

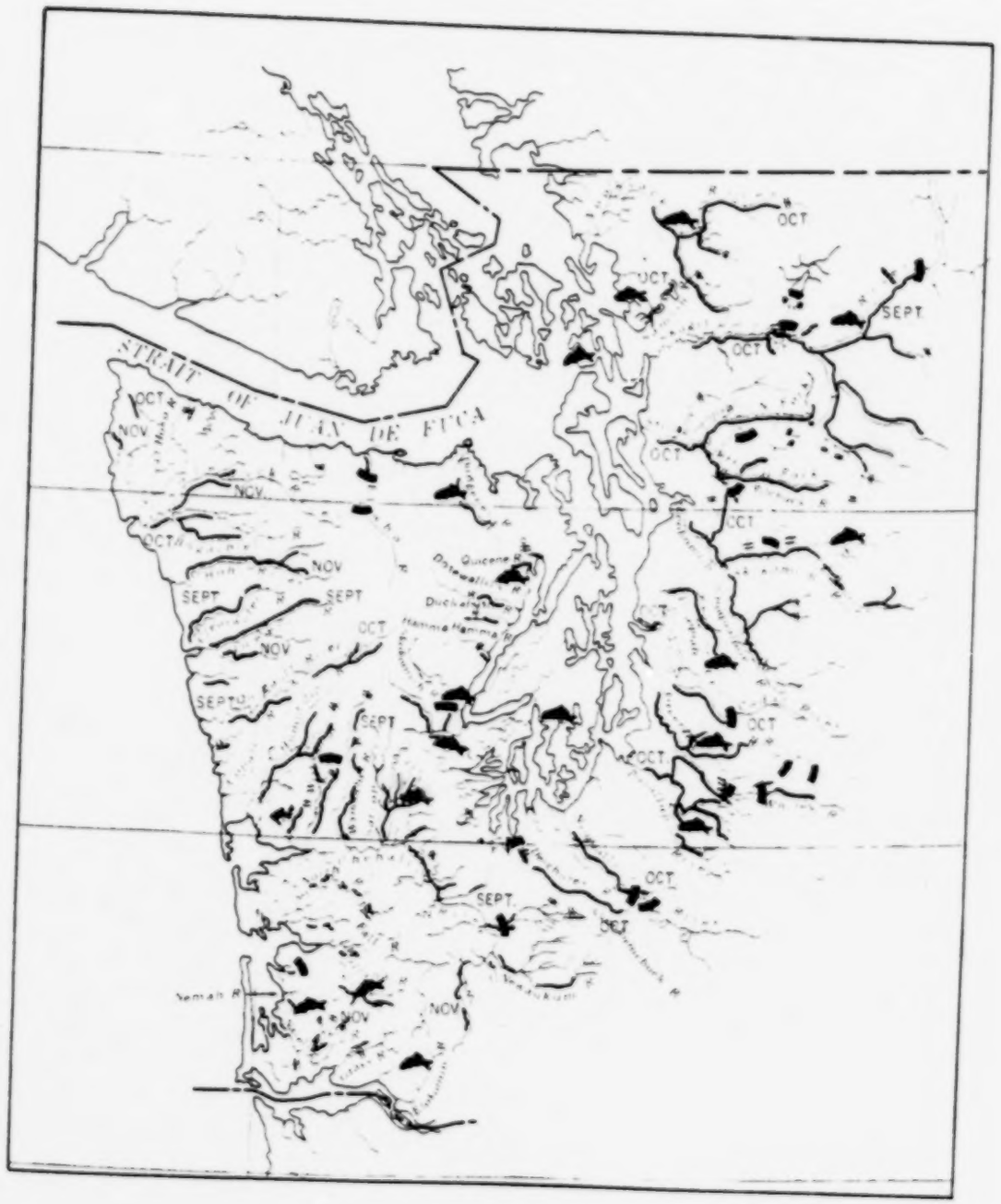


APPENDIX II

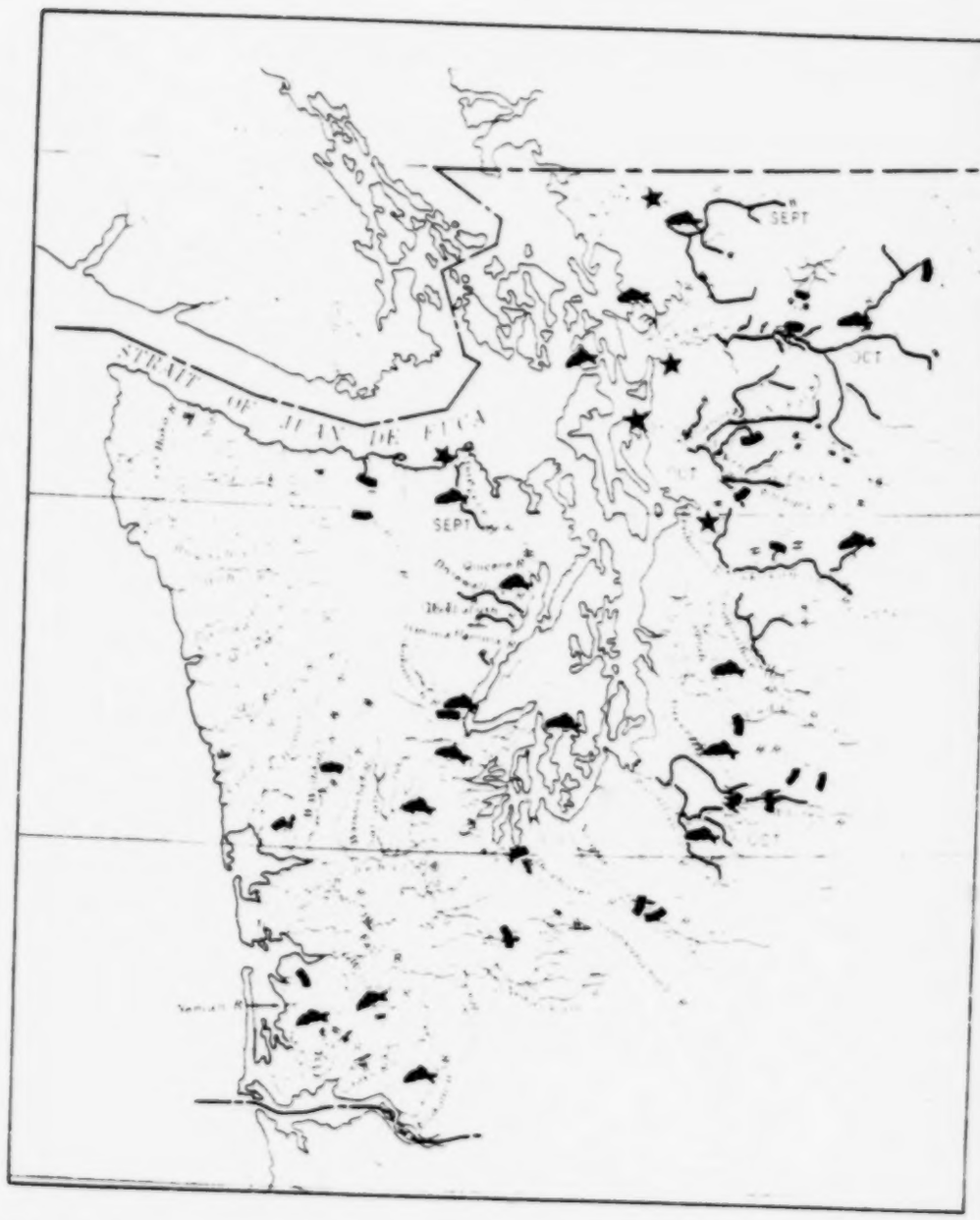
pages A7 - A11

Ocean distribution of steelhead trout from tributaries emptying into the Gulf of Alaska and from waters of Washington, Oregon, and California.

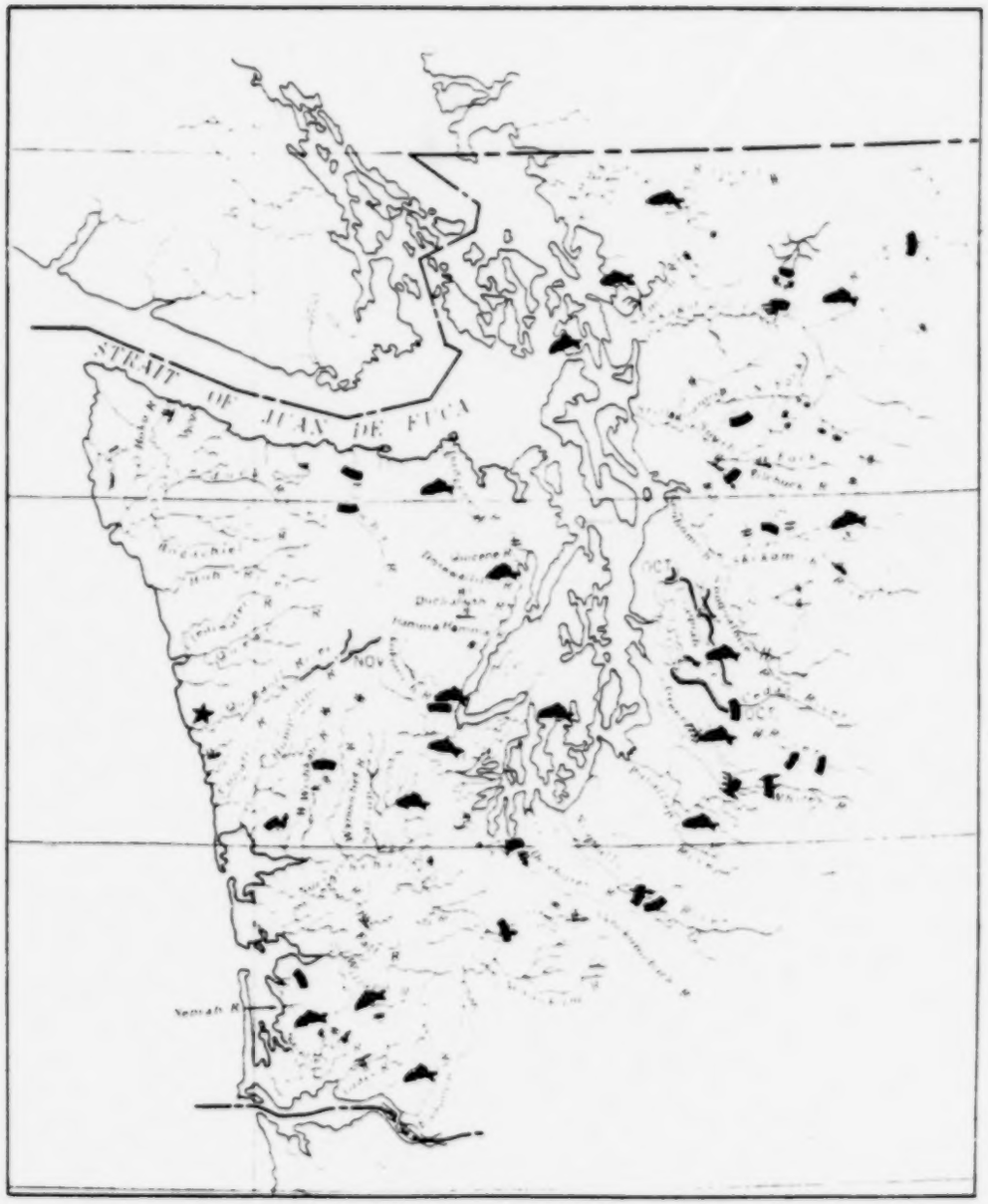




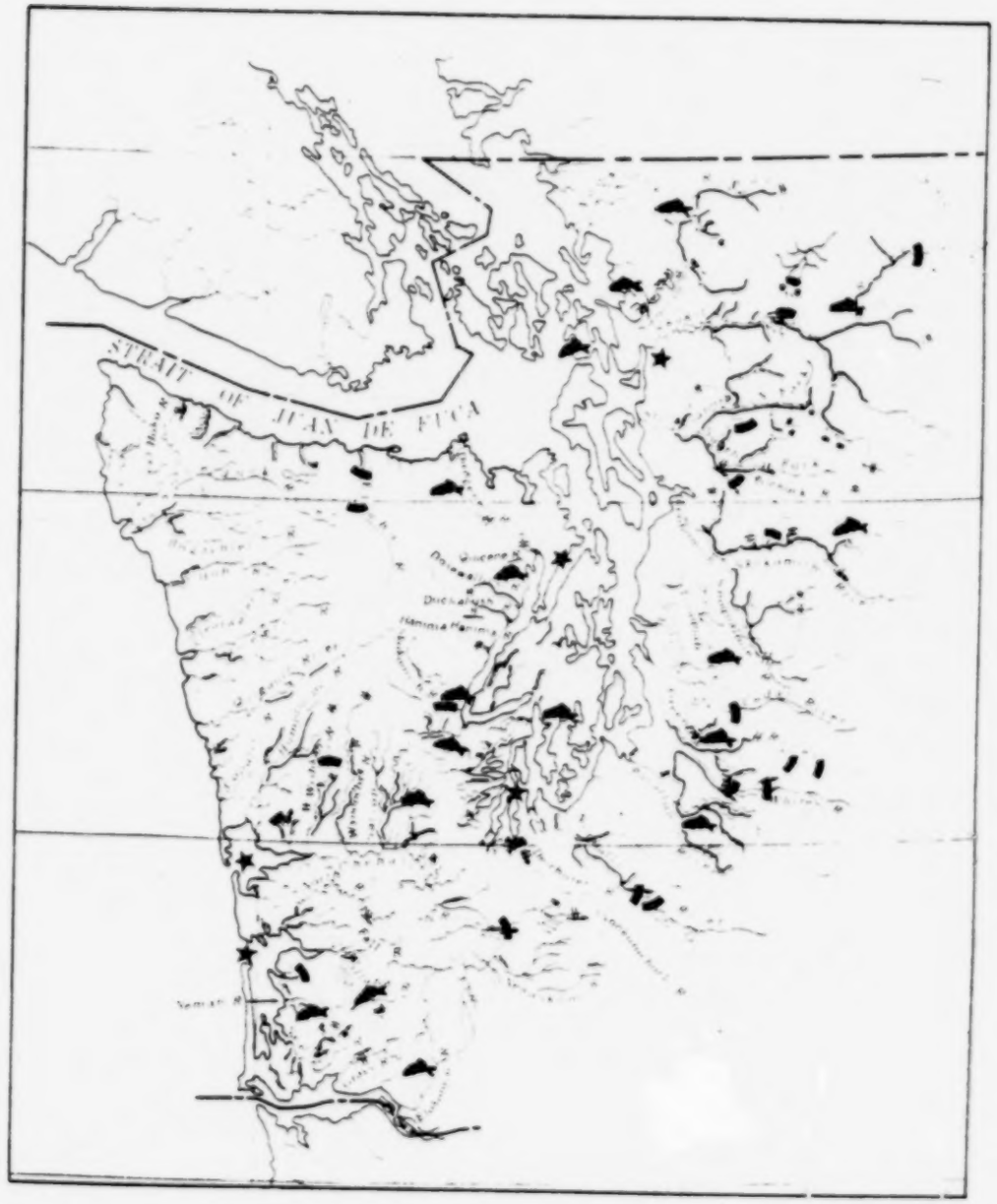
Spawning grounds of chinook salmon in Washington coastal waters (spawning areas shown by black lines along rivers).



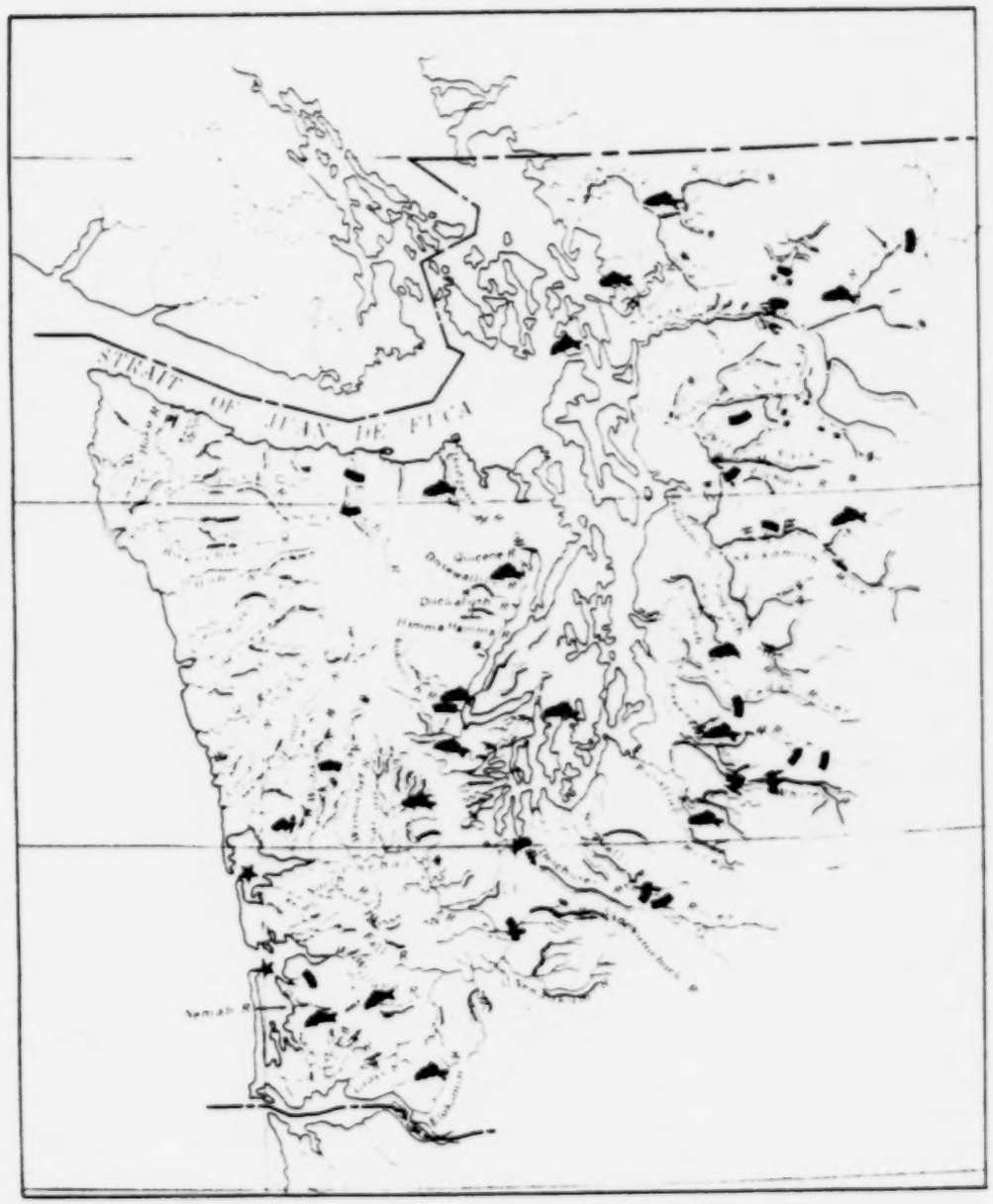
Spawning grounds of pink salmon in Washington coastal waters (spawning areas shown by black lines along rivers).



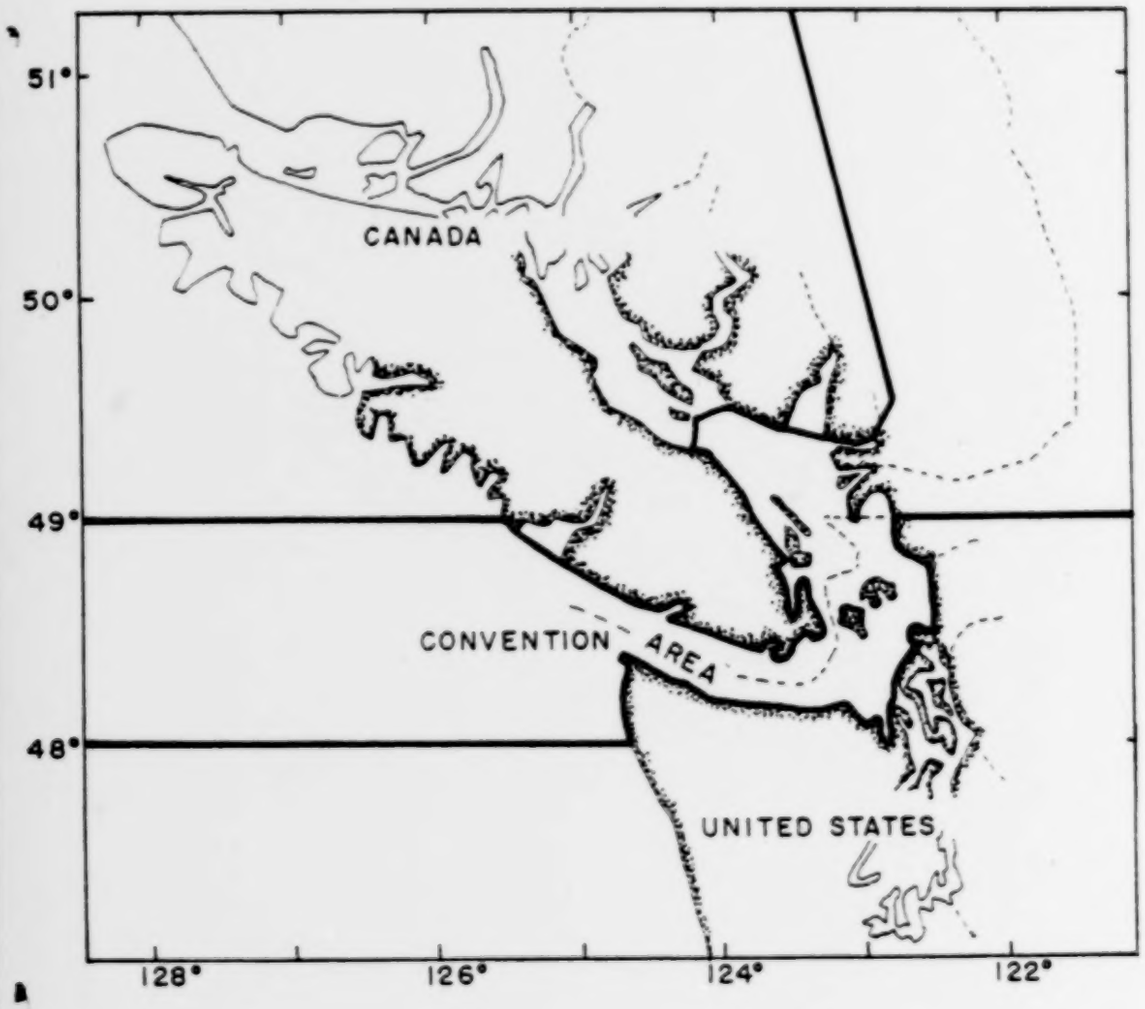
Spawning grounds of sockeye salmon in Washington coastal waters (spawning areas shown by black lines along rivers).



Spawning grounds of chum salmon in Washington coastal wa (spawning areas shown by black lines along rivers).



Spawning grounds of coho salmon in Washington coastal waters (spawning areas shown by black lines along rivers).



Convention area of the International Pacific Salmon Fisheries Convention between Canada and the United States.